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THE RULES

OF

LAW AND ADMINISTRATION

RELATING TO

WILLS AND INTESTACIES

BY

CHARLES PERCY SANGER,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

SECOND EDITION.

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PREFACE

TO THE SECOND EDITION.

The new legislation which comes into force on January 1, 1926, makes far-reaching changes in the law of Wills and Intestacies. The law of real and personal property is to a large extent assimilated, but not by making that of real resemble that of personal in all respects. The suggestion made in the preface to the first edition of this book that entails of personalty might be allowed has been adopted; but, in future, estates tail either in real or personal property will not be created by informal expressions. Copyhold tenure and special customs are abolished; the law of Intestacy has been revolutionised. But for some time to come it will be necessary to know both the old and the new law; and as Mr. Jarman observed (referring to the Wills Act, 1837) "by drawing a line between Wills of an earlier and those of a later date, the Legislature has diminished the importance without permitting the

rejection or neglect of the old law." The Chapters on the existing law of intestacy, for instance, will still be required for many years.

The next generation will feel the benefit of the reforms, but the present one will have the burden of learning both the old and the new law.

C. P. S.

LINCOLN'S INN,
May, 1925.

PREFACE

TO THE FIRST EDITION.

THE object of this Book is to state, concisely, the rules which should be known by all who administer the estates of deceased persons.

The difficulty of the subject is largely due to the fact that the English Law of Real Property is technical, obscure, and unsuited to the needs of a civilised nation. The Land Transfer Commissioners in their report say (p. 53): "We may observe that land held for a term of 999 years at a peppercorn rent is, as the law stands, Personal Property: and the mere extension of this principle to land held in fee would by itself abolish nearly the whole of the artificial distinctions between Real Estate and Personal Estate which have been created by Act of Parliament and ancient custom with regard to methods of transfer and descent."

A one-section Act of Parliament which converted all estates in fee into long terms of years would simplify and improve the law in a high degree.

It would be possible to enact that land could be entailed as at present, and to extend this privilege to heirlooms and all other forms of property.

The Real Property Bill introduced last Session proposes to get rid of the scandal of copyholds and certain

forms of tenure, but in other respects—*e.g.*, the three rules for the administration of insolvent estates—keeps the absurdities alive.

C. P. S.

New Square, Lincoln's Inn,
January, 1914.

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RULES OF LAW AND ADMINISTRATION

RELATING TO

WILLS AND INTESTACIES.

PART I.

RULES OF LAW AND ADMINISTRATION.

INTRODUCTION.

All property may be disposed of by will.

ENGLISH law differs from that of most other countries in the fact that it gives a practically unlimited power of disposition of property by will. A person clearly cannot dispose by will of an interest which ceases on his death; further, a joint tenant cannot by will deprive the other joint tenant of his right to take by survivorship, and before 1926 a tenant in tail cannot by will defeat or dispose of the estates of the subsequent heirs in tail (*a*); but with these exceptions it is almost accurate to say that by virtue of section 3 of the Wills Act all property may be disposed of by will. Further, a man may by will be able to dispose of property which is not his, but over which he has a special or general power of appointment; and a general devise or bequest, in the absence of a contrary intention, is sufficient to exercise a general power of appointment

(*a*) Under section 176 of the Law of Property Act, 1925, a tenant in tail in possession will, after 31st December, 1925, be able to dispose of his entailed property as if he had barred the entail.

(Wills Act, s. 27), except the statutory power to dispose of entailed interests.

It follows that the law relating to wills is of the greatest practical importance in this country. Wills are written documents; the testator's intention is determined by ascertaining what the written words, judicially interpreted, mean.

Wills are often obscure. In the case of certain ambiguities which frequently occur the course of judicial decisions, or sometimes statutory enactments (*e.g.*, section 29 of the Wills Act), have laid down certain rules of construction. A rule of construction always yields to a contrary intention expressed in the will, but, except in the case of five rules known as "presumptions," parol evidence of the testator's intention is not admissible to rebut or control a rule of construction. The nature of such rules is most excellently stated in the preface to Mr. Vaughan Hawkins' celebrated book as follows: "A rule of construction may always be reduced to the following form: Certain words or expressions which may mean either x or y shall, *primâ facie*, be taken to mean x."

Rules of construction.

It often happens that a deceased person leaves a will which on the face of it is free from all obscurity or ambiguity. The testator's expressed intentions may, however, in such a case, fail to take effect either by reason of some rule of law or by reason of the state of the circumstances at his death. There is, therefore, a body of law which is applicable in cases where no difficulty arises on the face of the will. It is necessary that those persons who administer the estate of a deceased person should bear certain rules in mind.

A rule of law is a rule which always operates to defeat the intention of the testator as expressed in his will; it never yields to the expression, however emphatic, of a contrary intention. The rule in *Shelley's Case* and the rule against remoteness are familiar illustrations.

Rule of law always defeats expressed intention.

If, however, there is a difficulty caused by the state of facts, there is a series of rules, called rules of administration, which lay down what is to be done in the absence of a contrary intention expressed in the will. Thus, if the

Rules of administration.

testator's estate is not sufficient to discharge his debts and at the same time to furnish all the specific and pecuniary bequests, the question arises—Which of the bequests shall fail? for creditors must be paid. Here a rule of administration comes into play. It cannot be said to defeat the intention, for it is the state of facts which has prevented the expressed intention taking full effect; and if the testator has contemplated the possibility of his estate being insufficient he can express in his will his intention—for example, that his debts shall be borne in some order other than that laid down by the rules of administration. Such rules, therefore, apply to those cases where the testator has expressed no other intention.

Rules as to the legal interest.

There is, however, one type of rule such as that which deals with the passing of the legal interest in property to the personal representatives or prohibits the creation of particular legal estates which does not yield to expressed intention; but such rules, which are only laid down for the convenience of administration, do not affect the beneficial interests of legatees or devisees, and, therefore, do not affect what may be called the beneficial intentions of the testator.

Parol evidence not admissible to rebut a rule of administration.

Parol evidence of a contrary intention is not admissible to rebut a rule of administration.

Equitable rules as to election, &c.

There is, however, a further class of circumstances to be considered. Although the will is, on the face of it, unambiguous, the facts may cause a difficulty. For example, a testator leaves some specific property to A. and gives other property to B. It, however, proves to be the case that the property expressed to be given to A. really belongs to B.; so that the intention as expressed can only be carried out if B. is willing to "elect" that A. shall have B.'s property which is expressed to be given to A. Thus we get the equitable doctrine of election. There are other equitable doctrines—for example, that, *primâ facie*, a father does not mean to give a child a double portion—which lead to certain "presumptions" which are mentioned below. These equitable rules are analogous to rules of administration in so far as they profess to carry

Presumptions.

out what the testator would have done had he realised the actual state of facts at his death. These presumptions may be rebutted by parol evidence, but parol evidence is not admissible to rebut either a rule of construction or a rule of administration.

In the case of an "equivocation," parol evidence is admissible.

But the state of facts may give rise to a clear ambiguity. Thus, a testator gives a legacy to his nephew, John Brown; he has two nephews of that name. In such a case—an equivocation—parol evidence of intention is admissible.

This book treats solely of the elementary rules to be applied in the administration of the estates of deceased persons where on the face of the will (if any) there is absolutely no obscurity or ambiguity. If there is an ambiguity, it may, if it is one of a kind that has often occurred, be solved by some well-established rule of construction. Hawkins on Wills contains a statement of more than one hundred of the most important of such rules. If no well-established rule of construction is applicable, the personal representatives are not safe in acting without taking the opinion of the Court.

Parol evidence admissible to *explain* words of will, but not to show intention.

The subject of parol evidence is not treated, except incidentally, in this book. The general principle is stated by Farwell, L.J., in the following words: "In construing a will the Court has to ascertain not what the testator actually intended as distinguished from what his words have expressed, but what is the meaning of the words he has used. As Wigram on Extrinsic Evidence puts it, any evidence is admissible which in its nature and effect simply explains what the testator has written, and no evidence can be admissible which in its nature and effect is applicable for the purpose of showing what he really intended." (*Re Ofner*, [1909] 1 Ch. at p. 67.)

Presumptions.

In the case of "presumptions" it should be noted that the presumption raised by the Court of equity is against what the will says; consequently, the admissibility of parol evidence to rebut the presumption does not conflict with the preceding principle. These presumptions are (*b*):—

(*b*) See Hawkins on Wills, at pp. 15, 16.

(1) A debt is satisfied by a legacy of equal or greater amount. (*Post*, Chap. VII.)

(2) A portion is satisfied by a legacy. (*Post*, Chap. VII.)

(3) Legacies of the same amount given with the same motive in different instruments are substitutional. (*Post*, Chap. VII.)

(4) An advance adeems a legacy given as a portion. (*Post*, Chap. VII.)

(5) A legacy to a sole executor or equal legacies to several executors deprives them of the undisposed-of residue. (Hawkins on Wills, Chap. XXI.)

Although, in general, a minor cannot make a will (Wills Act, s. 7), and wills must be in writing and signed by the testator in the presence of two witnesses present at the same time (Wills Act, s. 9), it should be remembered that soldiers (including members of the Air Force (Wills (Soldiers and Sailors) Act, 1918, s. 5, sub-s. 2), on actual military service and mariners and seamen at sea can make wills of personal estate without these formalities (but subject to the provisions of the Navy and Marines (Wills) Acts, 1865, 1897 and 1914, and section 177 of the Merchant Shipping Act, 1894); and this privilege was extended to real estate by section 3 of the Wills (Soldiers and Sailors) Act, 1918.

Wills of soldiers and seamen. Wills Act, s. 11.

It should also be remembered that a member of a friendly or industrial society or registered trade union may, by writing under his hand delivered at or sent to the registered office of such society, nominate any person to whom any moneys payable by the society on the death of such member, not exceeding £100, shall be paid on his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator such society is bound to pay to the nominee the amount due to such deceased member, not exceeding the sum aforesaid. (Provident Nominations and Small Intestacies Act, 1883, s. 3; Industrial and Provident Societies Acts, 1893 to 1913.)

Testamentary nomination by members of friendly &c. societies.

Intestacy.

Where a person dies intestate or partially intestate the law determines how the property so undisposed of is to devolve, or, as it is sometimes expressed, the law makes a will for him. The rules in relation to this are dealt with in Part II. of this book. On January 1, 1926, the law of intestacy will be entirely changed, see Chapter XX.

CHAPTER I.

The Rule in Shelley's Case.

Rule in *Shelley's Case.*

RULE. If (by an instrument coming into operation before 1926) land is limited in remainder to the heirs or heirs of the body of a person to whom a preceding estate of freehold is given, the words "heirs" or "heirs of the body" are words of limitation. (*Shelley's Case*, 1 Rep. 93 b; *Van Grutten* v. *Foxwell*, [1897] A. C. 658.)

Thus, if land is devised to A. for life, remainder to B. for life, remainder to the heirs of the body of A., A. takes an estate tail.

A short history of this celebrated rule will be found in Lord Macnaghten's judgment in *Van Grutten* v. *Foxwell* ([1897] A. C. at p. 668). Lord Mansfield's attempt (in *Perrin* v. *Blake*, 4 Burr. 2579) to subvert it gave rise to Mr. Fearne's great treatise on Contingent Remainders. The best short account of the rule is that in Chap. XIII. of Challis on Real Property. It is a rule of law which defeats the expressed intention.

The rule, as stated by counsel in 1 Rep. 104a, is, "It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases (the heirs) are words of limitation of the estate, and not words of purchase."

Lord Davey's statement of the rule.

Lord Davey states the rule as follows:—

"Wherever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death, in such terms as to embrace, according to

the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs, or heirs male of the body, or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary," ([1897] A. C. at p. 684.)

Rule does not apply where one limitation is equitable and the other legal.

The rule applies to equitable as well as to legal limitations (*Richardson* v. *Harrison*, 16 Q. B. D. 85), but not where one limitation is legal and the other equitable. "Ever since the case of *Jones* v. *Lord Say and Seal* [3 Bro. P. C. 458] it has been considered, and perhaps there was no doubt of it before, that a legal estate in the ancestor and an equitable estate to the issue could not be united so as to increase the estate in the ancestor." (*Per* Lord Kenyon, C.J., in *Venables* v. *Morris*, 7 T. R. at p. 347; see also 16 Q. B. D. at p. 104, and *Re Hobbs*, [1917] 1 Ch. 569.)

When part of the land is in mortgage.

It may happen that although on the face of the instrument creating the limitations one is legal and the other equitable, yet by reason of the legal estate being outstanding, as by reason of the property being subject to a mortgage, all the limitations are in fact equitable. It is not completely settled whether the rule applies in such a case. It may be observed that if part only of the estate was subject to a mortgage, the two parts of the estate would be subject to different limitations if the rule applied. Lord Cranworth, C., was clearly of opinion that the rule would not apply in such a case. "If a testator after devising, in the precise words used in this will, lands of which he was seised in fee, should mortgage a part for years and other part in fee, it is a strange proposition that the will should operate differently on the equity of redemption of the one and of the other. The argument of the defendant must go the length of contending that, though the owner of the legal fee may certainly, by means of a term of years and a limitation to trustees to preserve contingent remainders, give the beneficial interest for life to the first taker, and at his death to

the heirs of his body as purchasers, yet that he cannot by any means accomplish this if he has only the equitable fee. A proposition fraught, as it seems to me, with serious mischief. . . ." (*Coape* v. *Arnold*, 4 D. M. & G. at p. 587.)

On the other hand, in *Re White and Hindle's Contract* (7 Ch. D. 201, in which *Coape* v. *Arnold* was not cited) Malins, V.-C., held that where the property devised was subject to a mortgage so that the devise was of an equitable estate, the rule in *Shelley's Case* applied although the ultimate limitation to the heirs was legal in form. *Sed qu.*

The Land Transfer Act, 1897.

The effect of section 1 of the Land Transfer Act, 1897, may be to convert limitations which in form are legal into equitable limitations (prior to the assent by the executors), but it is submitted that this would not alter the construction of a will so as to attract the operation of a rule in cases where it would not have applied prior to the passing of the Act. (See *Re Robson*, [1916] 1 Ch. 116.)

Estate—by implication or during widowhood.

The estate of freehold in the ancestor may be given by implication (*Pybus* v. *Mitford*, 1 Vent. 372); nor does it affect the operation of the rule that the estate may terminate in the ancestor's lifetime. "The estate during widowhood is an estate of freehold; and the possibility, that it may terminate in the life of the widow, and before there can be an heir, is no objection." (*Per* Sir W. Grant, M.R., in *Curtis* v. *Price*, 12 Ves. at p. 99.)

Will and codicil.

For the purpose of the rule, a will and a schedule to it are one instrument (*Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698); and it can hardly be doubted that a will and a codicil are in the same case, for they together form the testamentary disposition of the deceased. It does not appear to be settled whether the rule applies where one limitation is in an instrument creating a power and the other is in an appointment in exercise of the power.

"Issue."

The rule applies where the word "issue" is used instead of "heirs of the body" (*Roddy* v. *Fitzgerald*, 6 H. L. C. 823), and in any other case where the words used are construed to mean "heirs of the body."

The great struggle has been to determine what expres-

Context may *explain* "heirs" or "heirs of the body."

sions used by the testator are sufficient to *explain*, upon a principle of construction known as the dictionary principle, that by "heirs" or "heirs of the body" the testator meant children or some other class not including the whole issue capable of taking by descent.

"The testator may conceivably shew by the context that he has used the words 'heirs,' or 'heirs of the body,' or 'issue' in some limited and restricted sense of his own which is not the legal meaning of the words—*e.g.*, he may have used the words in the sense of children, or as designating some individual person who would be heir of the body at the time of the death of the tenant for life, or at some other particular time." (*Per* Lord Davey in *Van Grutten* v. *Foxwell*, [1897] A. C. at p. 685.)

Jesson v. *Wright*.

It seems to be settled as a rule of construction that the addition of words of limitation, or of distribution, or both, to "heirs of the body" is not sufficient to explain heirs of the body so that the words have other than their legal meaning. Thus, a devise to A. for life with remainder to the heirs of his body, share and share alike, their heirs and assigns, would vest in A. an estate tail. (*Jesson* v. *Wright*, 2 Bli. 1; Hawkins on Wills, 3rd ed. p. 225.)

Context may *explain* "issue."

The word "issue" is less inflexible than "heirs of the body." Probably words of limitation alone are not sufficient to alter its legal meaning (see *per* Lord Cranworth, C., in *Parker* v. *Clarke*, 6 D. M. & G. at p. 109); on the other hand, "where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only." (*Per* Bovill, C.J., in *Bradley* v. *Cartwright*, L. R. 2 C. P. at p. 522.)

For these rules of construction, see Jarman on Wills, Chapters XLIX. and LI.; and Hawkins on Wills, Chapter XVI.

New law. After 1925 the rule in *Shelley's Case* abolished.

RULE. If (by an instrument coming into operation after 31st December, 1925) land is limited in remainder to the heirs or heirs of the body of a person to

whom a preceding estate of freehold is given, the words "heirs" or "heirs of the body" are words of purchase.

This rule is enacted by section 131 of the Law of Property Act, 1925, in the following words:—

Abolition of the rule in *Shelley's Case.*

"Where by any instrument coming into operation after the commencement of this Act an interest in any property is expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the Rule in Shelley's case, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate in equity as words of purchase and not of limitation, and shall be construed and have effect accordingly, and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person or persons shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act."

It will be noticed that the heir will have to be traced under the existing law (see *post*, Chap. XVII.) and not under the new law of intestacy which comes into force in 1926. The expression "shall operate in equity" is used, because after 31st December, 1925, it will not be possible to create a legal life estate or estate tail or a legal remainder. The expression "the general law" apparently means that the heir is to be traced as if the land were held in common socage and was not gavelkind or subject to any special custom.

CHAPTER II.

Perpetuities and Remoteness.

THE OLD RULE AGAINST PERPETUITIES.

ALTHOUGH the Legislature in enacting the statute *De Donis Conditionalibus* intended that perpetual entails should be created, this intention was frustrated by the judges. Various other methods were then employed to create a perpetual entail or perpetuity. There is a good description of these contrivances or devices in the third Report of the Real Property Commissioners; but all these devices were held bad on the ground that they were in effect attempts to create a "perpetuity."

Meaning of "perpetuity."

"A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment." (*Per* Lord Nottingham in the *Duke of Norfolk's Case*, 3 Ch. Cas. at p. 31.)

Fearne's statement.

Fearne states the principle thus: "Any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered void in its creation." (C. R. p. 503.)

In the same way perpetual trusts of personal property, except in favour of a charity, were held to be bad.

This general principle may be stated as follows:—

Rule against perpetuities.

RULE. Every disposition (except in favour of charity) which tends to make property inalienable for an indefinite period is void. (*Re Dutton*, L. R. 4 Ex. D. 54.)

Thus, all attempts to create an unbarrable estate tail are void.

Other examples of perpetuities.

In *Re Parry and Daggs* (31 Ch. D. 130) the testator devised land to his son and his heirs, and declared that in case his son should die without leaving lawful issue [which was held to refer to death at any time] the land should go to the son's next heir-at-law. Fry, L.J., said: "From the earliest times the Courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership"—and held that the device was illegal and the gift over void.

In *Parfitt* v. *Hember* (L. R. 4 Eq. 443) Lord Romilly, M.R., commences his judgment by saying, "I think that in this will an intention is shown to give a series of life estates in perpetuity to the issue of the nephews and niece," and he applied the doctrine of *cy-près*. (See below as to this. See also *Re Backhouse*, [1921] 2 Ch. 51.)

Trusts of personal property.

So, trusts of personal property for a non-charitable purpose, which prevent the property from being alienable during an indefinite period, are void. Thus, "a gift of a sum of money for the repair of a grave or tomb without reference to the distinction whether in a church or not, is void, not being a charity." (*Per* Kindersley, V.-C., in *Hoare* v. *Osborne*, L. R. 1 Eq. at p. 587.) So, a gift to provide an annual prize for sport is bad as a perpetuity (*Re Nottage*, [1895] 2 Ch. 649); but the Courts have striven to hold that gifts for useful objects are charitable and not within the rule against perpetuities. (See *Re Good*, [1905] 2 Ch. 60; *Re Donald*, [1909] 2 Ch. 410.)

Repair of grave.

Cy-près.

Cy-près.—Where the *general* intention of a testator is to devise his land so that it will descend through a series of issue as an estate tail, and his *particular* intention is to prevent any person from having power to alienate the property, and so create a perpetuity which is void, there is a rule of construction known as *cy-près*, "by which you sacrifice the particular intent to the general intent, or the subordinate

intent to the paramount intent." (*Per* Jessel, M.R., in *Hampton* v. *Holman*, 5 Ch. D. at p. 190.) Farwell, J., has approved Professor Gray's statement of the rule, which is as follows: "When land is devised to an unborn person for life, remainder to his children in tail, either successively or as tenants in common with cross remainders, the unborn person takes an estate tail; and when land is devised to an unborn person for life, remainder to his sons in tail male, either successively or as tenants in common with cross remainders, the unborn person takes an estate tail male. This is called the doctrine of *cy-près*." (*Re Mortimer*, [1905] 2 Ch. at p. 506.) On this rule of construction, see Hawkins on Wills, Chapter XVI., Jarman on Wills, 6th ed. Chapter X., and *Re Hobbs*, [1917] 1 Ch. 569.

In the case of wills coming into operation after 31st December, 1925, the *cy-près* rule appears to be abolished by section 130, sub-section (1) of the Law of Property Act, 1925.

THE RULE IN "WHITBY v. *MITCHELL."*

By the middle of the 18th century it was clear that all devices to create perpetual entails would be held bad under the old rule against perpetuities.

Suggested origin of the rule.

"Every conveyancer had to bear it in mind as a rule which made it useless to attempt to tie up land by limiting it to an unborn person for life; such a limitation would of course be good in itself, but as it could not be followed by any limitation to the issue of the unborn person, it would be quite useless for the purpose of a strict settlement. Hence it is easy to see how the old rule against perpetuities ceased to be stated as a general rule forbidding the creation of unbarrable entails, and came to be stated in the form of a working rule for conveyancers, forbidding the limitation of land to the children of an unborn person, as purchasers, in succession to their parent." (Mr. C. Sweet, at p. 207 of Vol. III. of the *Columbia Law Review*.) This working rule is known as the rule in *Whitby* v. *Mitchell*. The existence of the rule is denied by Professor Gray (see *Law*

Quarterly Review, Vol. XXIX. p. 26), but it is established in this country.

Rule in *Whitby* v. *Mitchell.*

RULE. A limitation of land (by an instrument coming into operation before 1926) to an unborn person for life, with remainder to the children of such unborn person, is void as to the remainder to the children. (*Whitby* v. *Mitchell*, 44 Ch. D. 85; *Re Nash*, [1910] 1 Ch. 1; *Monypenny* v. *Dering*, 2 D. M. & G. 145; *Re Clarke's Settlement Trust*, [1916] 1 Ch. 467.)

The rule applies to equitable as well as to legal contingent remainders (*Re Nash*, [1910] 1 Ch. 1); and where the limitation in remainder is created by an appointment under a special power. (*Re Nash*, *supra.*)

Where the children are the children of a living person the fact that the other parent may not be alive at the date of the instrument does not attract the operation of the rule. (*Re Bullock's Will Trusts*, [1915] 1 Ch. 493; *Re Garnham* [1916] 2 Ch. 413.)

The rule does not apply to personal estate. (*Re Bowles*, [1902] 2 Ch. 650.)

New law. Abolition of the rule.

NEW LAW.—In the case of limitations or trusts created by an instrument coming into operation after 31st December, 1925, the rule is abolished by section 161 (1) of the Law of Property Act, 1925, which runs as follows:—

"The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities."

It is difficult to see why the word "unborn" occurs before the word "child," but the section is clearly aimed at the rule in *Whitby* v. *Mitchell*, which the marginal note refers to as the double possibility rule. The last words of the sub-section seem to refer to the rule in *Cadell* v. *Palmer* (*post*), and the rule stated *supra*, p. 12, but it is by no means

certain whether other rules—*e.g.*, one based on the decision in *Re Frost*, 43 Ch. D. 246—are to be treated as subsisting. (See an article by the late Charles Sweet in 27 L. Q. R. p. 150).

CADELL v. *PALMER.*

When it had been finally established that every attempt to create a perpetuity (in the sense in which that word was used in the 17th and 18th centuries) would fail, it remained doubtful how far by means of trusts and executory devises and bequests it was possible to tie up property. Gradually a new rule was evolved, but its precise form was not settled until 1833. This rule is now usually referred to as the rule against perpetuities, or the rule against remoteness, but it must be remembered when reading old cases or text-books that references to "perpetuities" are not references to this comparatively modern rule. The rule may be stated as follows, but it is subject to some exceptions.

The modern rule against remoteness.

Rule in *Cadell* v. *Palmer.*

RULE. Every executory interest in property which does not vest indefeasibly within a period of one or more lives in being and twenty-one years afterwards is void. (*Cadell* v. *Palmer*, 1 Cl. & Fin. 372 (*a*)).

For the purposes of the rule a child *en ventre sa mère* is considered as a life in being. (*Ib.*; *Re Wilmer's Trusts*, [1903] 2 Ch. 411.) In applying the rule, possible and not actual events have to be considered. It is not sufficient that the property actually vests indefeasibly within the period, if possibly it might not have done so.

Possible not actual events to be considered.

"There are two well-known rules of law applicable to the vesting of all executory trusts and limitations, which are so thoroughly established as to admit of no exception or contradiction to their authority. The one is, that the executory trust or limitation not only *may* but necessarily *must* take effect (if it takes effect at all) within the period

(*a*) The executory devise in *Cadell* v. *Palmer* vested 99 years and 4 months after the death of the testatrix. (61 Sol. J. 708.)

of a life or lives in being, and twenty-one years after, with a sufficient allowance in addition for the birth of a posthumous child. The other rule is, that if, at the time of its creation, the limitation is so framed, as not, *ex necessitate*, to take effect within the prescribed period, that is, if it is bad in its inception, it will not become valid by reason of the happening of subsequent events which may bring the time of its actual vesting and taking effect within the period prescribed by law." (*Per* Tindal, C.J., in *Dungannon* v. *Smith*, 12 Cl. & Fin. at p. 612.)

"That question has always been investigated by looking to the state of things as it was at the testator's death; and if, at that time, the whole might be too remote, then you could not rectify it, by looking to the way in which the events actually turned out at any later time." (*Per* Selborne, C., in *Pearks* v. *Moseley*, 5 A. C. at p. 722.)

"A will takes effect at the death of a testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being." (*Per* Jessel, M.R., in *Hale* v. *Hale*, 3 Ch. D. at p. 645.)

Limitation by reference.

If land is limited by will to A. for life, and after his death to the uses to which the X. estate shall then stand limited, this is good (although at the date of the testator's death it is not known what the limitations will be), if the limitations of the X. estate at A.'s death are in fact such that, if read into the will, they would not be void for remoteness. (*Re Fane*, [1913] 1 Ch. 404.)

Woman past child-bearing.

In applying the rule, it must be assumed that a woman, no matter how old she be, is capable of child-bearing. (*Re Dawson*, 39 Ch. D. 155; *Ward* v. *Van der Loeff*, [1924] A. C. 653.)

Gifts to a class.

Gifts to a class.—Since the rule requires that the interests are indefeasibly vested, it is not sufficient in the case of gifts to a class that the maximum number of the class must be ascertained within the period; each share must be ascertained.

"The rule . . . is that the limitation must be such that every member of the class, where it is a question of a class gift, must of necessity take within the time allowed." (*Per* Chitty, J., in *Re Dawson*, 39 Ch. D. at p. 164.)

"A gift is said to be to a 'class' of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is, that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members." (*Per* Lord Selborne, C., in *Pearks* v. *Moseley*, 5 A. C. at p. 723; see *Re Mervin*, [1891] 3 Ch. 197.)

If, however, the shares of certain members of the class must be definitely ascertained within the period, it seems that the gift is good as to these shares. (*Re Moseley's Trusts*, L. R. 11 Eq. 499.)

Interests must be indefeasibly vested within the period.

The interests taken by the beneficiaries must be indefeasibly determined within the period, it is not sufficient that the persons who take are ascertained within the period so that they could together make a good title to the property.

Thus, in *Re Hargreaves* (43 Ch. D. 401), Cotton, L.J., said: "It is very true that after the decease of the tenants for life the children could have disposed of their interests, vested and contingent, so that (apart from the question of the validity of the limitations) the estate might have been disposed of as soon as the tenants for life were dead, and it may be contended that as the alienation of the estate is not prevented the case is not within the rule as to remoteness. But that is not the true way of looking at it. An executory limitation to take effect on the happening of an event which may not take place within a life in being and twenty-one years, is not made valid by the fact that the person in whose favour it is made can release it." (P. 405.)

"The question may be stated in the simplest possible manner. A marriage settlement is made in the usual form, and with the usual power of appointment among the

children of the marriage. An appointment is made by the husband and wife by a direction to the trustees of the settlement to hold the trust fund upon trust to pay each daughter, as and when she marries, a sum of £1,500, and, subject to that, disposing of the rest of the trust fund, or not disposing of it, or appointing part of it to some of the children, and leaving the remainder to go as in default of appointment. The question is, whether this is good, seeing that the daughters may marry more than twenty-one years after the death of the survivor of the husband and wife, and that until a daughter marries it is necessarily left uncertain what will be taken by the other children, and what is to be taken by them under the appointment or under the provisions of the settlement if there be no appointment. That seems to be obnoxious to the rule against perpetuities . . . and it appears to me that, on principle, the appointment is bad." (*Per* Kekewich, J., in *Re Gage*, [1898] 1 Ch. at p. 504.)

Gifts vesting later than 21.

New Law.—Cases of hardship sometimes occur where by reason of vesting being postponed till after the age of twenty-one the trusts fail under the rule. To obviate this, section 163 of the Law of Property Act, 1925, which applies to appointments, devises and gifts by the will of a person dying after 31st December, 1925, provides that:—

New law as to gifts vesting later than 21.

(1) "Where in a will, settlement or other instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift is, or but for this section would be, rendered void for remoteness, the will, settlement, or other instrument shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age

of twenty-one years, and that age shall be substituted for the age stated in the will, settlement, or other instrument."

(2) "This section applies to any instrument executed after the commencement of this Act and to any testamentary appointment (whether made in exercise of a general or special power), devise, or bequest contained in the will of a person dying after such commencement, whether the will is made before or after such commencement."

(3) "This section applies without prejudice to any provision whereby the absolute vesting or ascertainment is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the will, settlement, or other instrument is attained."

Limitation depending on prior void limitation is bad.

Limitation depending on void limitation.—"Any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid." (*Per* Stirling, J., in *Re Abbott*, [1893] 1 Ch. at p. 57; *Re Hewett's Settlement*, [1915] 1 Ch. 810.)

But if a limitation following one which is too remote, can take effect independently of the void limitation, it may be good, as a gift in default of appointment where the power to appoint is bad (*Re Abbott*, [1893] 1 Ch. 54); or where the ultimate limitation is an alternative and independent gift (*Re Davey*, [1915] 1 Ch. 837).

Interests, if vested, need not fall into possession within the period.

Vested interest in reversion.—It is not necessary that the interests should vest in possession within the period. Thus, if a testator give a life interest to his son, and on the son's death a life interest to any widow the son may leave, and on her death the capital to the son's children, this is good, although the son may marry a woman who was unborn at the testator's death, and she may outlive the son by more than twenty-one years. For the interests of the son's children vest at his death, and the interest of the widow vests at the same time. The testator could have given the corpus to the widow on the death of the son, and therefore he can give her a smaller interest.

But if the testator had given a discretionary trust for the maintenance of the son's widow and children during the life

of the widow, this would have been bad. (See *Re Blew*, [1906] 1 Ch. 624; *Kennedy* v. *Kennedy*, [1914] A. C. 215.)

Vested remainder may fail under the old rule.

Vested remainder.—It is evident that a vested remainder cannot offend against the rule against remoteness, but it may offend against the old rule against perpetuities, and be void on that account. (*Re Mortimer*, [1905] 2 Ch. 502—the reference to remoteness in the headnote is erroneous.)

Reversionary leases.

Reversionary leases.—Before 1926 a reversionary lease can be granted to commence at a date beyond the period fixed by the rule (*Mann, Crossman & Paulin, Lim.* v. *Land Registry*, [1918] 1 Ch. 203), but after 31st December, 1925, it will be no longer possible to grant a lease to take effect more than twenty-one years from the date of the grant, because section 149, sub-section (3) of the Law of Property Act, 1925, provides that:—

"A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void; but this subsection does not apply to any term taking effect in equity under a settlement, or created out of an equitable interest under a settlement, or under an equitable power for mortgage, indemnity or other like purposes."

Restraint on anticipation.

Restraint on anticipation.—The rule applies to a restraint upon anticipation (*Re Game*, [1907] 1 Ch. 276); but if the rule is infringed in this way, the restraint is held to be void, and the legatee or devisee takes the interest free from the restraint. (*Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Cunynghame's Settlement*, L. R. 11 Eq. 324.)

Exceptions.

Exceptions.—The rule does not apply—

Powers of distress, etc., by way of indemnity.

"(a) To any power to distrain on or to take possession of land or the income thereof given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not; or

Rentcharge by way of indemnity

"(b) To any rentcharge created only as an indemnity against another rentcharge, although the indemnity rentcharge may only arise or become payable on breach of a condition or stipulation; or

"(c) To any power whether exercisable on breach of a condition or stipulation or not, to retain or withhold payment of any instalment of a rentcharge as an indemnity against another rentcharge; or

Right for working minerals.

"(d) To any grant, exception, or reservation of any right of entry on, or user of, the surface of land or of any easements, rights, or privileges over or under land for the purpose of— (i) winning, working, inspecting, measuring, converting, manufacturing, carrying away, and disposing of mines and minerals; (ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof; (iii) executing repairs, alterations, or additions to any adjoining land, or the buildings and erections thereon; (iv) constructing, laying down, altering, repairing, renewing, cleansing, and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works."

—cutting trees

—executing repairs

—constructing drains.

(Section 162 of the Law of Property Act, 1925.)

Powers to secure rentcharges.

Nor does it apply to any powers or remedies conferred by section 121 of the Law of Property Act, 1925 (which replaces section 44 of the Conveyancing Act, 1881), nor to the same or any like powers or remedies conferred by any instrument for recovering or compelling the payment of any annual sum within the meaning of that section.

Negative covenants.

Negative covenants.—Negative covenants, easements and charitable gifts are not within the rule. (See *per* Jessel, M.R., in *L. & S. W. Rail. Co.* v. *Gomm*, 20 Ch. D. at p. 583; *Mackenzie* v. *Childers*, 43 Ch. D. 265.)

Powers of appointment.—"A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards is, by reason of the rule against perpetuities, absolutely void; but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule." (*Per* Parker, J., in *Re De Sommery*, [1912] 2 Ch. at p. 630; quoted by Russell, J., in *Re Allott*, [1924] 2 Ch. at p. 505, when the principle was applied to a power of leasing.)

Special power.

Thus, the ordinary power in a marriage settlement under which the spouses or the survivor of them can appoint among the issue of the marriage, is good, because the power can only be exercised within the period given by the rule; if an appointment is made which infringes the rule, the appointment is bad.

"It does not follow that because the original power might have been badly exercised, yet, if it is so exercised as not to infringe the rule, the possibility of its being exercised in another way would make the power void. Power to appoint amongst issue *primâ facie* means indefinite issue, and might include persons beyond the line, but the question in all cases is what has been done." (*Per* Lord Cairns, C., in *Slark* v. *Dakyns*, L. R. 10 Ch. at p. 39.)

Power to appoint to issue.

On the other hand, if the donee or donees of the power are not necessarily ascertained within the period, the power is bad. Thus, in *Re Hargreaves*, where a testator gave a power of appointment to the longest liver of her two sisters and their children, Cotton, L.J., said: "In my opinion the power to appoint is void for remoteness. This power is given to the last survivor of the sisters and their children. The children might not all be in being at the death of the testatrix; the power, therefore, is not given to a person who must necessarily be ascertained within the period allowed by the rule against perpetuities." (43 Ch. D. at p. 405.)

Special power capable of being exercised after the period is bad.

The special power is read into the instrument creating

the power, and the period allowed by the rule begins at the time of such instrument coming into operation.

"Where . . . the will under consideration is made in exercise of a special power of appointment, the question whether an estate or interest appointed by it be too remote depends upon its distance from the creation, not from the exercise, of the power. In other words, the period within which estates and interests limited by the appointment made in exercise of a special power must vest, does not begin from the death of the person exercising the power, but, if such power was created by a will, from the death of the original testator." (*Per* Joyce, J., in *Re Thompson*, [1906] 2 Ch. at p. 202.)

General powers.

In the case of general powers of appointment the period is calculated from the date of the execution of the power, on the principle that a general power is in effect equivalent to ownership. In *Re Powell's Trusts* (39 L. J. Ch. 188), James, V.-C., held that a general power to appoint by will only was not in effect equivalent to ownership, and consequently that where such a power was exercised the period must be calculated, not from the death of the testator exercising the power, but from the date when the instrument creating the power came into operation. Chitty, J., in *Rous* v. *Jackson* (29 Ch. D. 521), and North, J., in *Re Flower* (55 L. J. Ch. 200), have held, on the contrary, that in such a case the period runs from the death of the testator exercising the power. The subject is discussed in articles in the *Harvard Law Review*, reprinted in the *Law Times Journal*, Vol. 134, p. 287, and Vol. 135, p. 493; see also an article in 59 Sol. J. p. 526.

Trust for sale.

Trusts for and powers of sale, &c.—Trusts and powers are subject to the rule. Thus, a trust for sale is not good if it may not arise until after the period allowed by the rule (*Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Wood*, [1894] 3 Ch. 381; *Re Bewick*, [1911] 1 Ch. 116); but it may nevertheless be the case that, in spite of this, the beneficial interests are determined within the period, and do not fail (*Re Daveron*, [1893] 3 Ch. 421); and it is sufficient if the

trust for sale arises at the expiration of the period (*English* v. *Cliff*, [1914] 2 Ch. 376). The test is whether the power is capable of being exercised at a point of time when the perpetuity period has run out. If it is, the power has been held by the Court of Appeal to be bad. (*Re Allott*, [1924] 2 Ch. 498) (*a*).

Power divisible.

Sometimes a power is divisible into two powers, one of which is good while the other is bad.

"Where the settlor has used language from which the Court may fairly infer that he contemplated the creation, not of a single power, but of two distinct powers, one of which only is open to objection because of the rule against perpetuities, the Court will avoid the latter only and will give effect to the power which is not open to this objection." (*Per* Parker, J., in *Re De Sommery*, [1912] 2 Ch. at p. 631.)

Contingent remainders.

Legal contingent remainders.—The question whether the rule applies to legal contingent remainders has recently been agitated. At one time the law was clear. The Real Property Commissioners never imagined that legal remainders were subject to the rule. (Third Report, pp. 29 and 30.) In 1842 Lord St. Leonards said: "It is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question." (*Cole* v. *Sewell*, 4 Dr. & War. at p. 28; 2 H. L. C. 186; see also *Abbiss* v. *Burney*, 17 Ch. D. 211.) The late Mr. Challis thought that the question ought never to have arisen. "It implies an anachronism which may be said to trench upon absurdity." (Real Property, 3rd ed. p. 197.)

Re Frost. *Re Ashforth.*

But Kay, J., in *Re Frost* (43 Ch. D. 246), and Farwell, J., in *Re Ashforth* ([1905] 1 Ch. 535), in spite of the anachronism, have expressed the opinion that the rule against remoteness applies to legal contingent remainders. If these decisions are followed, the law will have been changed without the assistance of the Legislature. Is it possible that the Contingent Remainders Act, 1877, may have altered the position?

(*a*) On this case see an article in vol. 41 of the Law Quarterly Review, p. 52.

"It must be borne in mind that judges are very ready to extend the rule against perpetuities; and that, though the historical argument against extending the rule to legal limitations cannot easily be answered, it can easily be disregarded." (Challis, Real Property, 3rd ed. p. 200.)

Note.—After 31st December, 1925, no legal remainders can be created (see below, p. 29).

Equitable remainders.

Equitable contingent remainders.—In the matter of equitable contingent remainders, equity did not follow the law (*Abbiss* v. *Burney*, 17 Ch. D. 211); and they are subject to the rule.

Common Law conditions.

Common law conditions.—Another question which has recently arisen, is whether common law conditions are subject to the rule. In 1833 they were not. The Real Property Commissioners recommended that the law should be altered. (Third Report, pp. 36, 69.) The Legislature did not carry out this recommendation. Nevertheless, Byrne, J., in *Re Trustees of Hollis Hospital and Hague's Contract* ([1899] 2 Ch. 540) held that such a condition in a deed dated in 1726 was obnoxious to the modern rule, and his decision has been followed by Eve, J. (*Re Da Costa*, [1912] 1 Ch. 337.) If these decisions are followed, the recommendation of the Real Property Commissioners will have been carried into effect.

Conditions (other than common law conditions) are subject to the rule (*Re Lady Staveley's Trusts*, 124 L. T. 466); and after 31st December, 1925, the rule will apply in the cases within section 4, sub-section (3) of the Law of Property Act, 1925, which provides that:—

The new law.

"All rights of entry affecting a legal estate which are exerciseable on condition broken or for any other reason may after the commencement of this Act, be made exerciseable by any person and the persons deriving title under him, but, in regard to an estate in fee simple (not being a rentcharge held for a legal estate) only within the period authorised by the rule relating to perpetuities."

Limitations subsequent to an estate tail.—By virtue of the Statute *De Donis Conditionalibus* (13 Edw. I. c. 1), entails were perpetual, but since the decision in *Taltarum's Case* (Year Book, 1472, 12 Edw. IV. 19) estates tail and the remainders and reversions expectant upon them could be barred by a common recovery, or since the Fines and Recoveries Act, 1833, by a deed made and enrolled in compliance with the terms of that Act. It has accordingly been held that an executory limitation which must take effect during or immediately after the determination of an estate tail is good. Limitation after an estate tail.

"'' No limitation after estates tail is . . . too remote; and it appears to us clear that, whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell and to divide the produce amongst such class, is wholly immaterial, if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail." (*Per* James, L.J., in *Heasman* v. *Pearse*, L. R. 7 Ch. at p. 282; see also *Re Haygarth*, [1912] 1 Ch. 510).

Executory limitations in default of issue.—Where a person dies after August 10, 1882, section 10 of the Conveyancing Act, 1882, restricted the operation of executory limitations over in default of issue. The operation was extended by the Law of Property (Amendment) Act, 1924, 3rd Schedule, 25, to meet certain criticisms in Challis, Real Property, 3rd ed. p. 179, and the rule is now as follows:—

RULE. (1) Where there is a person entitled to— Law of Property Act, 1925, s. 134.

(a) an equitable interest in land for an estate in fee simple or for any less interest not being an entailed interest, or

(b) any interest in other property, not being an entailed interest,

with an executory limitation over on default or

failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect.

(2) This section applies where the executory limitation is contained in an instrument coming into operation after the thirty-first day of December eighteen hundred and eighty-two, save that, as regards instruments coming into operation before the commencement of this Act, it only applies to limitations of land for an estate in fee or for a term of years absolute on life, or for a term of life. (Law of Property Act, 1925, s. 134.)

Real Property Act, 1845.

Note on contingent remainders.—Legal contingent remainders in freeholds failed if the contingent remainder did not take effect in possession immediately on the determination of the particular estate. By section 8 of the Real Property Act, 1845, it is enacted that "A contingent remainder, existing at any time after the 31st day of December 1844, shall be, and, if created before the passing of this Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold in the same manner, in all respects, as if such determination had not happened." This got rid of the necessity for trustees to support contingent remainders, except possibly in the case of a gift to a class (see Davidson's Conveyancing Precedents, 3rd ed. vol. 4, p. 389, note.) But the Act did not prevent the contingent remainder from failing if it did not immediately come into possession at the time of the natural expiration of the particular estate on which it depended. (*White* v. *Summers*, [1908] 2 Ch. 256.) The law was

Contingent Remainders Act, 1877.

further amended by the Contingent Remainders Act, 1877 (August 2, 1877), as follows: "Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

Equitable remainders.

Equitable contingent remainders were never liable to fail for want of a preceding estate of freehold. (*Re Brooke*, [1894] 1 Ch. 43; *Abbiss* v. *Burney*, 17 Ch. D. 211); and where by virtue of the Land Transfer Act, 1897, the devisees initially took equitable estates, it was held that they did not fail when by reason of the executors' assent they became legal. (*Re Robson*, [1916] 1 Ch. 117.)

Abolition of legal remainders.

New Law.—Section 1, sub-section 1 of the Law of Property Act, 1925, prohibits the creation of legal remainders, so that in the case of wills coming into effect on or after January 1, 1926, the question as to legal remainders referred to above will not arise.

CHAPTER III.

Accumulations.

In consequence of the remarkable will of Mr. Thellusson, the Accumulations Act, 1800 (usually called the Thellusson Act), enacted the following rule of law:—

Period during which accumulation is permitted.

Rule. Any direction in a will to accumulate for a period longer than—

(1) twenty-one years from the death of the testator, or

(2) the minority or respective minorities of any person or persons who are living or *en ventre sa mère* at the death of the testator; or

(3) the minority or respective minorities only of any person or persons who under the trusts of the will would for the time being, if of full age, be entitled to the income directed to be accumulated—

is void so soon as the period is exceeded unless the direction for accumulation is for the purpose of paying debts, providing portions for the children or issue of the testator or of any person taking an interest under the will, or relates to the produce of timber or wood. (The Accumulations Act, 1800.)

The Accumulations Act, 1800, has been repealed and re-enacted with some slight modifications by section 164 of the Law of Property Act, 1925, which runs as follows:—

"(1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely:— Restrictions on accumulations.

(a) the life of the grantor or settlor; or

(b) a term of twenty-one years from the death of the grantor, settlor or testator; or

(c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mère at the death of the grantor, settlor or testator; or

(d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

In every case where any accumulation is directed otherwise than as aforesaid the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

(2) This section does not extend to any provision—

(i) for payment of the debts of any grantor, settlor, testator or other person;

(ii) for raising portions for—

(a) any child, children or remoter issue of any grantor, settlor, or testator; or

(b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited;

(iii) respecting the accumulation of the produce of timber or wood;

and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

(3) The restrictions imposed by this section apply to instruments made on or after the twenty-eighth day of July, eighteen hundred, but in the case of wills only where the testator was living and of testamentary capacity after the end of one year from that date."

If a person is entitled to stop the accumulations as the only person interested, the Act does not apply. (*Wharton* v. *Masterman*, [1895] A. C. 186.)

As to the destination of the income which is released by the operation of the Act, see Jarman on Wills, pp. 388 *et seq.*, and *Re Garside*, [1919] 1 Ch. 132.

"The statute . . . was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, everything else is left as before, and all the other directions of the will as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute." (*Per* Lord Langdale, M.R., in *Eyre* v. *Marsden*, 2 Keen, at p. 574; quoted with approval by Thesiger, L.J., in *Weatherall* v. *Thornburgh*, 8 Ch. D. at p. 271.)

One of the periods only may be taken.

Only one of the periods mentioned in the Act may be chosen. On this Kekewich, J., in *Re Errington* (76 L. T. 616), said: "The Legislature has left me at large to apply one or other of those periods whichever will fit the case. What it has said, according to the cases about which there is no doubt, is, that you cannot apply more than one, and that you must choose that one which fits the case. You are not to choose the one which will give the longest period of accumulation, you are not to choose the one which you may suppose would best effectuate the intention, but you are to take the one that actually fits the intention as declared."

"The fourth period mentioned in the Act is not confined to the case of persons born in the testator's or settlor's lifetime." (*Per* Neville, J., in *Re Cattell*, [1907] 1 Ch. at p. 573; affd. [1914] 1 Ch. 177.)

It should be remembered that a trust for accumulation

which infringes the rule against remoteness is void *ab initio*. (*Scarisbrick* v. *Skelmersdale*, 17 Sim. 187.)

Trust may be void *ab initio*.

Accumulations under statutory power during minority.—Section 165 of the Law of Property Act, 1925, has added the following qualification:—

"Where accumulations of surplus income are made during a minority under any statutory power or under the general law, the period for which such accumulations are made is not (whether the trust was created or the accumulations were made before or after the commencement of this Act) to be taken into account in determining the period for which accumulations are permitted to be made by the last preceding section, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority."

Qualification of restrictions on accumulations.

As to the statutory power see Chap. IX., *post*, pp. 86, 87.

Accumulation for payment of debts.—A mortgage raised to pay estate duty may be an incumbrance for the discharge of which income may be accumulated beyond any of the periods. (*Re Baroness Llanover*, [1907] 1 Ch. 635.)

Accumulation for payment of debts.

If the debts are paid there cannot be an accumulation (beyond the period permitted) for the purpose of recouping the capital applied in the payment of the debts. (*Re Heathcote*, [1904] 1 Ch. 826.)

The exception does not apply where there is only a power to apply accumulations in payment of debts. (*Re Cresswell*, 57 Sol. J. 578.)

Accumulation for portions.—It is not easy to determine what is a portion within the meaning of the Act. In reference to this, Buckley, J., in *Re Stephens* ([1904] 1 Ch. at p. 327), observes: "Now, the meaning of the word 'portion,' as generally understood, is a sum of money secured to a child out of property either coming from or settled upon its parents. The benefit is none the less a portion, because it is given to all the children, including the

What is a portion?

eldest child, and not to younger children only. The question to be answered is whether the benefit to be taken by the children or some of them comes from their parents or out of property in which their parents take an interest."

On the other hand, "a direction to accumulate all a person's property to be handed over to some child or children when they attain twenty-one can never be said to be a direction for raising portions for the child or children." (*Per* Lord Cranworth, C., in *Edwards* v. *Tuck*, 3 D. M. & G. at p. 58.)

The cases on the subject are considered in Jarman on Wills, pp. 383 *et seq.*, and in *Re Elliott*, [1918] 2 Ch. 150.

Accumulation for purchase of land.

Accumulation for purchase of land.—Where the direction is for the purpose of the purchase of land only, the Accumulations Act, 1892 (which came into force on June 28, 1892), restricts the selection of the testator to the fourth of the four periods mentioned in the principal Act.

This section is repealed and re-enacted with slight modifications by section 166 of the Law of Property Act, 1925, which runs as follows:—

Restriction on accumulation for the purchase of land.

"(1) No person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

(2) This section does not, nor do the enactments which it replaces, apply to accumulations to be held as capital money for the purposes of the Settled Land Act, 1925, or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land.

(3) This section applies to settlements and dispositions made after the twenty-seventh day of June eighteen hundred and ninety-two."

When a testator directs the investment of personalty in the purchase of land to be settled and that pending the purchase the income is to be accumulated and added to the purchase money, the tenant for life will be entitled until the land is purchased to the income of the personalty accruing after one year from the testator's death. (*Sitwell* v. *Bernard*, 6 Ves. 520; *Tucker* v. *Boswell*, 5 Beav. 607.) Rule in *Sitwell* v. *Bernard.*

SAUNDERS v. *VAUTIER.*

The principle of *Saunders* v. *Vautier* (Cr. & P. 240) is as follows:—

RULE. Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. (*Per* Lord Davey, in *Wharton* v. *Masterman*, [1895] A. C. at p. 198.) *Saunders* v. *Vautier.*

"The principle of this Court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one." (*Per* Page-Wood, V.-C., in *Gosling* v. *Gosling*, Johns. at p. 272; quoted by Lord Herschell, at [1895] A. C. p. 192.)

The principle applies where the legatee is a charity, unless (*semble*) the accumulations are to be settled as a capital endowment at a future time. (*Wharton* v. *Masterman*, [1895] A. C. 186, 200.)

CHAPTER IV.

Mortmain—Charities.

MORTMAIN.

Devise of land to corporation void, unless authorised to hold land.

RULE. A devise of land to a corporation is void unless the corporation has a licence to acquire and hold land in mortmain or is authorised by statute to hold land in mortmain. (Mortmain and Charitable Uses Act, 1888, s. 1.)

Mortmain and Charitable Uses Act, 1888, s. 1.

"Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly." (Mortmain and Charitable Uses Act, 1888, s. 1, sub-s. 1.)

The second sub-section of section 1 provides for the case where the land is held of a mesne lord.

Exemptions.

Section 6 of the Act permits an assurance by will of twenty acres for a public park, two acres for a public museum, and one acre for a school-house for an elementary school, and of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only, provided that the will is executed twelve months before the testator's death, and is enrolled in the books of the Charity Commissioners within six months after the death.

Many public bodies are authorised to take and hold lands without a licence in mortmain. (See Tudor on Charities,

4th ed. p. 473; and the Chronological Index to the Statutes, under "Mortmain.")

Company.

Under section 16 of the Companies (Consolidation) Act, 1908, a company incorporated under the Act may hold land, but (section 19) if the company is formed for the purpose of promoting art, science, religion, charity, or any other like object not involving gain, it must not hold more than two acres without the licence of the Board of Trade.

Educational purposes.

Any assurance of land or of personal estate to be laid out in the purchase of land for educational purposes is exempt from the Mortmain and Charitable Uses Acts, 1888 and 1891 (Education Act, 1921, s. 117, sub-s. 1).

Public Trustee.

Trade union.

It may be mentioned that the Public Trustee, who is a corporation sole, has a licence in mortmain; also that land cannot be devised to a registered trade union, although it is not a corporation. (*Re Amos*, [1891] 3 Ch. 159.)

Devise to corporation when it has no head.

Many corporations have a head, *e.g.*, the mayor, where the corporate body is the mayor, aldermen, and citizens of a city; and if land was devised to a corporation of such a type, but at the time when the devise takes effect there is no head in existence, it was doubtful whether the devise could take effect. This doubt is now removed by section 180, subsection (2) of the Law of Property Act, 1925, which runs as follows:—

"Where either after or before the commencement of this Act there is or has been a vacancy in the office of a corporation sole or in the office of the head of a corporation aggregate (in any case in which the vacancy affects the status or powers of the corporation) at the time when, if there had been no vacancy, any interest in or charge on property would have been acquired by the corporation, such interest shall notwithstanding such vacancy vest and be deemed to have vested in the successor to such office on his appointment as a corporation sole, or in the corporation aggregate (as the case may be), but without prejudice to the right of such successor, or of the corporation aggregate after the appointment of its head officer, to disclaim that interest or charge."

CHARITIES.

Since August 5, 1891, both land and impure personalty may be devised or bequeathed for charitable purposes, subject to the following rule:—

Land devised to a charity to be sold within one year.

RULE. Land devised to or for the benefit of any charitable use shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator or such extended time as the Court or the Charity Commissioners may determine, unless it is exempted by law. (Mortmain and Charitable Uses Act, 1891, s. 5.)

Mortmain and Charitable Uses Act, 1891, s. 5.

"Land may be assured by will to or for the benefit of any charitable uses, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners." (*Ib.*, section 5.)

Personalty directed to be laid out in land. *Ib.*, s. 7.

"Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land." (*Ib.*, section 7; see *Re Sutton*, [1901] 2 Ch. 640.)

Section 8 enables the Court or the Charity Commissioners to sanction the retention or acquisition of land. The time may be extended by the Court as often as it is desirable. (*Re Sidebottom*, [1901] 2 Ch. 1.)

Proceeds of sale of land.

A gift of the proceeds of sale of land is not affected by sections 5 and 6 of the Act of 1891. (*Re Wilkinson*, [1902] 1 Ch. 841; *Re Sidebottom*, [1902] 2 Ch. 389.)

Places of historic interest.

Where by section 21, sub-section 2 of the private Act of the National Trust for Places of Historic Interest or Natural Beauty it was provided that their Council might by

resolution determine that any lands becoming vested in them were proper to be held for the benefit of the nation and thereupon such lands should be alienable, it was held that devised lands made inalienable by a resolution within one year of the testator's death were not liable to be sold under the Mortmain and Charitable Uses Act, 1891. (*Re Verrall*, [1916] 1 Ch. 100.)

For the earlier law, see the Mortmain and Charitable Uses Act, 1888, and the statutes repealed by that Act. Where, however, there was an existing exemption under the Act of 1888, the provisions for the sale of land under the Act of 1891 do not apply. These exemptions are, first, those given by section 6 of the Act of 1888 above referred to; secondly, assurances to or for the benefit of the Universities of Oxford, Cambridge, London, Durham, the Victoria University, the colleges within those universities, the Colleges of Eton, Westminster, and Winchester, and Keble College (section 7 of the Act of 1888); thirdly, various other statutory exemptions. See Tudor on Charities, 4th ed. pp. 468 *et seq.*; Tyssen on Charitable Bequests, 2nd ed. pp. 44 *et seq.*; and the Education Act, 1921, s. 117, sub-s. 1.

Exemptions.

The definition of land in the Act of 1888 was repealed by the Act of 1891; it now includes "tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land." (Mortmain and Charitable Uses Act, 1891, s. 3.)

Meaning of "land."

PUBLIC POLICY.

RULE. Devises and bequests for purposes which are against public policy are void. (*Thrupp* v. *Collett* (No. 1), 26 Bea. 125.)

Gift against public policy void.

Thus, in *Thrupp* v. *Collett*, where the bequest was of a sum of money to be applied in purchasing the discharge of persons committed to prison for non-payment of fines under the game laws, Romilly, M.R., said: "Looking at this bequest in a plain common-sense view, it is obviously calcu-

lated to encourage offences prohibited by the Legislature. This is against public policy, and the Court cannot carry such an object into effect." (26 Beav. at p. 128.) So, a trust to print and circulate a treatise inculcating the supremacy of the Pope is void as being against public policy. (*De Themmines* v. *De Bonneval*, 5 Russ. 288.)

Superstitious uses.

Gifts for superstitious uses are also, in general, void, unless there is a general charitable intention. "The policy of the Court will not permit the execution of a superstitious use; but the Court avails itself of the general intention to give the property to charity, although the particular charity chosen by the founder be superstitious; and it effectuates that general charitable intention by devoting the fund to some other charitable purpose." (*Per* Sir J. Leach, M.R., 5 Russ. at p. 297.)

Masses for the dead.

A bequest for masses for the repose of the testator's soul is not void as a gift to superstitious uses. (*Bourne* v. *Keene*, [1919] A. C. 815.)

Gift to friars.

In *Re Smith* ([1914] 1 Ch. 937), Joyce, J., held that a gift to Franciscan Friars was good notwithstanding the provisions of the Roman Catholic Relief Act, 1829, *sed qu.*

Denial of Christianity.

A gift to a company whose main object is to promote the principle that human conduct should be based on natural knowledge is valid, although this object may involve a denial of Christianity. (*Bowman* v. *Secular Society, Lim.*, [1917] A. C. 406.)

Power to trustees to decide.

A provision in a will that the trustees shall decide the identity of a legatee is void as being contrary to public policy. (*Re Raven*, [1915] 1 Ch. 673.)

CHAPTER V.

Lapse—Failure.

THE law does not, in general, permit a gift by will to a person who is dead at the time when the will takes effect.

RULE. Subject to the exceptions contained in sections 32 and 33 of the Wills Act a devise or bequest in favour of a person who predeceases the testator is void. (*Elliot* v. *Davenport*, 1 P. Wms. 83.)

Dead person cannot take under a will.

This is so, although the devise or bequest may be to A., his heirs and assigns, or to A., his executors, administrators and assigns, as the case may be. (*Ib.*)

The exceptions contained in the Wills Act, 1837, are as follows:—

" Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi-entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." (Section 32.)

Wills Act, s. 32. Devise of estate tail.

After 31st December, 1925, it will be possible to entail personalty (section 130, sub-section (1) of the Law of Property Act, 1925). Section 32 of the Wills Act will apparently apply because section 130 (1) says that " all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property."

Entails of personalty.

Wills Act, s. 33. Gift to issue of testator who predeceases leaving issue.

"Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." (Section 33.)

Effect of s. 33.

"If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustee in bankruptcy and so on." (*Per* Stirling, L.J., in *Re Scott*, [1901] 1 Q. B. at pp. 239, 240, quoted by Sargant, J., in *Re Pearson*, [1920] 1 Ch. 247.)

In *Re Hensler* (19 Ch. D. 612), a father devised a freehold house to his son, and his residuary real estate upon trusts for the benefit of other persons. The son died in his father's lifetime leaving issue, having devised all his real estate to the father. Hall, V.-C., held that the son took the house, but died intestate as to it, so that the son's heir-at-law was entitled.

As to what is a sufficient indication of a contrary intention see *Re Meredith*, [1924] 2 Ch. 552.

Sect. 33 does not apply to a class.

Gifts to a class.—It should be remembered that section 33 does not apply to gifts to a class where, apart from section 33, there would have been no lapse. There is a rule of construction that a devise or bequest to the children of the testator means *primâ facie* the children in existence at the testator's death. (Hawkins on Wills, Chap. VII.)

Thus, if a man leaves his property equally among his children, and a child dies in the testator's lifetime leaving issue who survive the testator, section 33 is not applicable, and such child's issue, devisee, or next of kin would not take.

But if the testator leaves his property equally between his children A., B. and C., naming them, this is not a class gift (*Bain* v. *Lescher*, 11 Sim. 397), and if A. predeceases the testator, leaving issue living at the testator's death, section 33 would operate.

Gifts to a class.

"The difference between a gift to named individuals, and a gift to a class, in reference to lapse, is firmly established. A gift by will to a class is taken, in Law and in Equity, to be a gift, where it is immediate, to those only who survive the testator; and, where it is not immediate but postponed, to be a gift to those only who survive the testator, or come into being before the period of distribution. Take gifts to children: when the gift is to a child named, and he dies in the testator's lifetime, it fails to take effect, apart from the 33rd section. The reason of its thus lapsing is found in the ambulatory nature of a will, which does not come into operation until the testator's death; a deceased person cannot take under a will, just as a deceased person cannot take under a deed, which has an immediate operation. But where the gift is to children as a class, to take as tenants in common, a child dying in the testator's lifetime was excluded by the law as it stood before the passing of the Wills Act; and, according to the decisions already cited, the 33rd section does not apply, although the child leaves issue that survives the testator." (*Per* Chitty, J., in *Re Sir E. Harvey's Estate*, [1893] 1 Ch. at p. 570.)

Powers of appointment.

Powers of appointment.—Sect. 33 does not apply to gifts made in exercise of a special power of appointment (*Holyland* v. *Lewin*, 26 Ch. D. 266); but by reason of section 27 of the Wills Act it applies to gifts made in exercise of a general power. (*Eccles* v. *Cheyne*, 2 K. & J. 676.)

General power.

Where a person having a general power of appointment by will exercises it in favour of persons who predecease the testator, the question arises whether the persons entitled

in default of appointment take. This depends upon the construction of the will. In *Re Boyd*, Romer, J., expressed the matter as follows: "The principle which has to be applied to all cases of this class is clear. I have to ascertain whether the donee of the power meant, by the exercise of it, to take the property dealt with out of the instrument containing the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed. The difficulty lies in the application of the principle. The conclusion I have come to in the present case is that the testatrix has not by her will and codicils sufficiently indicated an intention to make this £5,000, the subject of the power, hers for all purposes, and that so far as concerns the lapsed shares they go as in default of appointment." ([1897] 2 Ch. at p. 235.)

Re Marten ([1902] 1 Ch. 314) is an instance where the testatrix was held to have exercised the power for all purposes.

Presumably section 33 will apply where a tenant in tail in possession has exercised the power given to him by section 176 of the Law of Property Act, 1925.

A mere declaration not sufficient to prevent lapse.

Declaration against lapse.—The testator may provide against lapse by giving the property to some other person in the event of the original legatee or devisee predeceasing him, but a mere declaration against lapse is insufficient.

"The general law does not allow a legatee who predeceases the testator to take any benefit under his will. In that event the gift is said to lapse, with the consequence that it falls into residue, or if it is itself a share of residue, goes to the testator's next of kin. It is not competent to a testator to exclude the application of this rule of law, but the consequences of a lapse can be avoided by the substitution of some other legatee to take the legacy if the event which occasions the lapse occurs. Such a substitutionary gift is often introduced by a direction that the legacy is not to lapse but is to go to the substituted legatee. In such a case the introductory words are of course quite inoperative unless followed by the substitution

of another legatee, but if so followed they are not construed as an attempt to exclude the rule of law as to lapse, but as indicating an intention to avoid the consequences which a lapse would otherwise entail by substituting another legatee." (*Per* Parker, J., in *Re Greenwood*, [1912] 1 Ch. at p. 396.) The substituted legatee may be the person who would take if the original legatee had died immediately after the testator. (*Re Smith*, [1916] 2 Ch. 368.)

Legacy to creditor.

Exception.—A legacy to a creditor of his debt, which has been barred by time, takes effect, although the creditor predeceases the testator (*Williamson* v. *Naylor*, 3 Y. & C. Ex. 208; *Re Sowerby's Trust*, 2 K. & J. 630); and the same principle applies in certain other cases where the legacy is in discharge of a moral obligation. (*Stevens* v. *King*, [1904] 2 Ch. 30.)

"I think that the cases of *Williamson* v. *Naylor* [3 Y. & C. Ex. 208], *Philips* v. *Philips* [3 Hare, 281], and *In re Sowerby's Trust* [2 K. & J. 630], have established the rule that if the Court finds, upon the construction of the will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse." (*Per* Farwell, J., in *Stevens* v. *King*, [1904] 2 Ch. at p. 33.)

Charity *cy-près*.

Gifts to charities.—If a testator gives a legacy to a charitable institution which has ceased to exist, the legacy will be applied *cy-près* if there is a general charitable intention. So if the institution ceases to exist after the testator's death. (*Re Cunningham*, [1914] 1 Ch. 427.)

"There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity

shall be carried out. There is another class, in which the testator shews an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally; that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity." (*Per* Kindersley, V.-C., in *Clark* v. *Taylor*, 1 Drew. at p. 644; quoted with approval by Lord Herschell, C., in *Re Rymer*, [1895] 1 Ch. at p. 31.)

Charitable gift for particular purpose.

And if a charitable gift is given for a particular purpose, which it is impossible to carry out, the gift fails, unless there is a paramount general charitable intention.

"First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. . . .

"Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift,—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail." (*Per* Parker, J., in *Re Wilson*, [1913] 1 Ch. at p. 320; quoted by Neville, J., in *Re Packe*, [1918] 1 Ch. 437.)

A charity does not cease to exist because its objects have been changed by the Court of Chancery or the Charity Com-

missioners (*Re Faraker*, [1912] 2 Ch. 488); or because it is converted by Act of Parliament into a body which is for all practical purposes identical. (*Re Magrath*, [1913] 2 Ch. 331.)

For further details on this subject see Chapters XI. and XVII. of the second edition of Tyssen's Charitable Bequests.

Presumption of survivorship.

Presumption of survivorship.—Formerly there was no presumption of survivorship where two persons died in the same accident or shipwreck (*Wing* v. *Angrave*, 8 H. L. C. 183); but by section 184 of the Law of Property Act, 1925, it is now provided that where, after 31st December, 1925, "two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder."

The law prevents an attesting witness from taking a benefit under a will.

Gifts to attesting witness void.

RULE. All gifts, beneficial devises or bequests to a person who attests the will, or to the wife or husband of such person, are void. (Wills Act, 1837, s. 15.)

This rule, which does not yield to any expression of a contrary intention, is enacted by section 15 of the Wills Act in the following terms:—

Wills Act, s. 15.

"If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife

or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void."

Will and codicil.

This only applies to the actual document which the witness attests, so that a legatee who attests a codicil does not lose a legacy given him by the will, although the codicil confirms the will, unless he also attested the will (*Tempest* v. *Tempest*, 2 K. & J. 642; *Re Marcus*, 57 L. T. 399); and this is so even if such witness is a residuary legatee, and the codicil revokes a legacy and so increases the amount of the residuary estate. (*Gurney* v. *Gurney*, 3 Drew. 208.) Further, if a will attested by a legatee is republished by a codicil not so attested, the legatee does not lose his legacy (*Anderson* v. *Anderson*, L. R. 13 Eq. 381), even if he subsequently attests a second codicil. (*Re Trotter*, [1899] 1 Ch. 764.)

Supernumerary witness.

It sometimes happens that a will is attested by more than two witnesses: if one of these is a legatee he will not lose his legacy if he did not sign as a witness. (*Randfield* v. *Randfield*, 30 L. J. Ch. 179, n.). Evidence is admissible to show this. Whether this point should be determined by the Court of Probate and the name of the legatee who apparently attested omitted from the probate, or whether the name should be included in the probate and the question of fact determined by a Court of construction, is not finally settled, but the latter appears to be the correct practice. (Jarman on Wills, p. 95.)

Witness to a soldier's will.

Since a privileged will made by a soldier does not require an attesting witness, a legatee who attests such a will does not lose his legacy. (*Re Limond*, [1915] 2 Ch. 240.)

It seems that a person who attests the attestation of a marksman is considered to be an attesting witness. (*Wigan* v. *Rowland*, 11 Hare, 157.)

Solicitor.

A direction that a solicitor-trustee may make professional charges is a beneficial gift, and such a solicitor who attests loses his right to charge. (*Re Trotter*, [1899] 1 Ch. 764.)

For the purposes of construction, however, the gift to an attesting witness is not to be treated as if it were struck out of the will. "The proper way of dealing with these

cases is first to construe the will, and ascertain what interests are given, and then to apply section 15 of the Wills Act." (*Per* Swinfen Eady, J., in *Aplin* v. *Stone*, [1904] 1 Ch. at p. 548.)

Legatee who kills testator.

It may be mentioned that a person who has feloniously killed the testator or intestate is not allowed to take any benefit under the will (*In b. Hall, Hall* v. *Knight and Baxter*, [1914] 1 P. 1) or intestacy. (*In b. Crippen*, [1911] P. 108.) There is an article on "A testator's Bounty to his Slayer," at p. 211 of Vol. XXX. of the *Law Quarterly Review*.

Disclaimer.

Disclaimer.—A legatee or devisee may disclaim a devise or bequest. The disclaimer may be by conduct.

"It is now established that a man's assent to a devise is presumed unless he disclaims, which may be by conduct as well as by record or by deed." (*Per* Lindley, L.J., in *Re Birchall*, 40 Ch. D. at p. 439.)

As to what conduct amounts to a disclaimer, see *Re Clout and Frewer's Contract* ([1924] 2 Ch. 230).

A married woman may for valuable consideration disclaim an annuity bequeathed to her without power of anticipation. (*Re Wimperis*, [1914] 1 Ch. 502.)

Two gifts in the same will.

A legatee to whom two separate gifts are made may take one and disclaim the other.

"It was never laid down, that because you refuse one benefit by a will, clogged with some burthen, therefore you are to be deprived of another benefit by the same will, unclogged with any burthen. Suppose a bequest to me of a house to live in, and afterwards in the same will a bequest of £100; and I find it inconvenient to live in the house: there is an intention of benefit to me, intending to give me more than I find it convenient to accept of: but that shall not deprive me of the other benefit." (*Per* Grant, M.R., in *Andrew* v. *Trinity Hall, Cambridge*, 9 Ves. at p. 534.)

But the two gifts must be separate, and not form one aggregate gift. (See *Re Hotchkys*, 32 Ch. D. 408, and the cases there referred to; *Re Lysons*, 107 L. T. 146.)

Disclaimer of life estate.

Where a life estate is disclaimed the effect, generally, is to accelerate the future interests if they are equitable. *Re Willis*, [1917] 1 Ch. 365; *Re Conynghame*, [1921] 1 Ch. 491, in each of which *Re Scott*, [1911] 2 Ch. 374, where the remainders were legal, was distinguished.

In *Re Brooke* ([1923] 2 Ch. 265), Younger, L.J., questioned the decision in *Re Scott*, but since after 31st December, 1925, it will no longer be possible to create legal remainders the question is of diminishing importance.

In *Re Young* ([1913] 1 Ch. 272), a trust legacy was given to A. for life, then to her son for life, and then over. A. refused to receive the income, but on her son's death asked that the future income should be paid to her. It was held that she was entitled to the income from her son's death; but this case does not decide whether a disclaimer can be retracted.

CHAPTER VI.

Conditions.

TESTATORS sometimes attach conditions to gifts; in some cases these conditions are inoperative. The law on this subject is difficult, and in some points uncertain.

RULE. Conditions which are against public policy are void. (*Re Beard*, [1908] 1 Ch. 383; *Egerton* v. *Brownlow*, 4 H. L. C. 1.)

Conditions against public policy void.

"It is a well-established rule of law that a condition against the public good, or public policy, as it is usually called, is illegal and void." (*Per* Lord Lyndhurst in *Egerton* v. *Brownlow*, 4 H. L. C. at p. 160.)

Examples of conditions against public policy are:—

Examples of bad conditions.

not to enter naval or military service (*Re Beard*, *supra*);

that a woman shall cease to reside with her husband (*Re Moore*, 39 Ch. D. 116);

that children should not be under the control of their father (*Re Sandbrook*, [1912] 2 Ch. 471);

that children may not reside abroad, for it might separate them from their parents (*Re Boulter*, [1922] 1 Ch. 75);

not to take legal proceedings to assert rights under a will (*Re Williams*, [1912] 1 Ch. 399);

that church services should be held according to the true time of the sun (*Re Wood*, 36 T. L. R. 560).

Examples of conditions which are good and not against public policy are:—

Examples of good conditions.

Nun.

that a woman shall not become a nun or a member of a sisterhood (*Re Dickson's Trust*, 1 Sim. (N.S.) 37, *Wainwright* v. *Miller*, [1897] 2 Ch. 255);

that a person shall not become a Christian (*Hodgson* v. *Halford*, 11 Ch. D. 959);

that a legatee shall obtain a title (*Re Wallace*, [1920] 2 Ch. 274);

or a provision for a married woman deserted by her husband until she returns to live with her husband (*Re Lovell*, [1920] 1 Ch. 122).

In *Re Borwick's Settlement* ([1916] 2 Ch. at p. 308), Eve, J., said: "Although it may well be that in a gift to A. B. conditional upon his doing something contrary to public morality, the condition can be disregarded as being contrary to public policy (see *Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604), it does not at all follow that the same consequences result in the case of a gift to A. B. so long as C. D. shall be doing something contrary to public morals. Indeed, in many cases, the very existence of the condition *contra bonos mores* may be the incentive of the gift, as, for example, a gift for the maintenance of the children of a married woman if and so long as she is living apart from her husband—a gift to which I apprehend no objection could be maintained on the ground of its being contrary to public policy."

"All the instances of conditions against law in a proper sense, are reducible under one of these heads:—

"First, either to do something that is *malum in se* or *malum prohibitum*.

"Secondly, to omit the doing of something that is a duty.

"Thirdly, to encourage such crimes and omissions." (*Per* Parker, C.J., in *Mitchel* v. *Reynolds*, 1 P. Wms. at p. 189.)

Conditions void for remoteness.

Remoteness.—Conditions may be void as infringing the rule against remoteness; but a condition under which property would pass from one charity to another is not bad on this ground (*Re Tyler*, [1891] 3 Ch. 252), even though the motive of the condition is to create a perpetual inducement

to do a non-charitable act, *e.g.*, to repair a tomb (*ib.*); but this principle does not apply where the first limitation is to an individual. (*Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.)

If the gift over is not to a charity and therefore void, the original gift is absolute. (*Re Davies*, [1915] 1 Ch. 543.)

Conditions are precedent or subsequent.

"Conditions are either precedent or subsequent; in other words, either the performance of them is made to *precede* the vesting of an estate, or the non-performance to *determine* an estate antecedently vested." (Jarman on Wills, 1st ed. Vol. 1, p. 796.)

It is a question of construction to determine the nature of the condition. The consequences which flow from conditions being void are not, as will be seen below, the same in the two cases.

Condition repugnant to an estate void.

RULE. A condition subsequent which is inconsistent with and repugnant to an estate or interest to which it is annexed is void. (*Bradley* v. *Peixoto*, 3 Ves. 324.)

Condition against alienating.

"I have looked into the cases that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition that tenant in fee shall not alien, is repugnant." (*Per* Arden, M.R., 3 Ves. at p. 325.)

Interests in personalty.

Absolute interests in personalty. — In *Bradley* v. *Peixoto* (*supra*), a condition against alienating personalty was held void.

Bankruptcy.

Bankruptcy.—A condition subsequent to defeat an absolute estate or interest on bankruptcy is void.

"If an estate in fee simple is given by a will or other instrument, with a proviso which is in law a condition subsequent defeating the estate on alienation or on bank-

ruptcy, the condition is void." (*Per* Chitty, J., in *Re Machu*, 21 Ch. D. at p. 842.)

"The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. . . . An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person." (*Per* Kay, J., in *Re Dugdale*, 38 Ch. D. at p. 182; and see *Re Smith*, [1916] 1 Ch. 369.)

A condition "unless he attempts to become bankrupt" does not apply to a bankruptcy *in invitum*. (*Re Evans*, [1920] 2 Ch. 304.)

Conditions restricting alienation of fee.

Estates in fee.—A condition attached to an estate in fee restrictive of alienation or of alienation in a particular manner (*Re Rosher*, 26 Ch. D. 801; *Corbett* v. *Corbett*, 14 P. D. 7) is void. In *Re Elliot* ([1896] 2 Ch. 353), a condition that if the devisee of an estate sold it certain sums should be paid out of the proceeds of sale was held void by Chitty, J., who said: "It appears to me that the testator has attempted to create a new kind of estate unknown to the law. The owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit. But this testator says that if the owner sells, a part only of the proceeds shall belong to her, and the residue shall go to other persons. This direction is, I think, repugnant and void. My opinion is based on the broad general principle of law" (p. 356).

"You cannot limit an estate to a man and his heirs until he shall convey the land to a stranger, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the same principle is applicable to gifts of personalty." (*Per* Kekewich, J., in *Metcalfe* v. *Metcalfe*, 43 Ch. D. at p. 639.)

But a limited restriction on alienation may be annexed to an estate in fee. In *Re Macleay* (L. R. 20 Eq. at p. 189),

Jessel, M.R., discussed the authorities, and observed: "So that, according to the old books, Sheppard's Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form. Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time." And held that a condition not to sell the land "out of the family" was good. In *Re Rosher* (26 Ch. D. 801), Pearson, J., criticised some of Sir G. Jessel's observations, saying, "If he means to assert that, provided you give a power to mortgage or lease, you may restrain the power to sell, all I can say is, that I most respectfully differ from him" (p. 819), and held that a restraint upon alienation *limited as to time* was bad. Limited restriction on alienation.

In the course of the argument in *Churchill* v. *Marks* (1 Coll. 441), an eminent conveyancer, supposed to be Mr. Lee, Q.C., in answer to a question put to him by the Court, stated his opinion to be, that a gift to A. in fee, with a proviso that if A. alien in B.'s lifetime the estate shall shift to B. is valid; but see Pearson, J.'s elaborate judgment in *Re Rosher*, 26 Ch. D. 801.

Reversionary interests.—A condition restricting alienation of a reversionary interest before it falls into possession, with a gift over, on such attempt to alienate is good. (See *Pearson* v. *Dolman*, L. R. 3 Eq. 315; *Re Porter*, [1892] 3 Ch. 481.) Reversionary interest.

Estates tail.—The incidents which the law attaches to an estate tail cannot be restrained by a condition. Estates tail.

"If a man makes gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the curtesy, or that tenant in tail shall not suffer a common recovery, these conditions

are repugnant and against law, because by the gift in tail, he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery." (*Sir Anthony Mildmay's Case*, 6 Rep. 41 a; quoted by Kay, J., in *Re Dugdale*, 38 Ch. D. at p. 181.)

Life estate.

Life estates and annuities.—"Property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; . . . any mere attempt to restrict the power of alienation, whether applied to an absolute interest or to a life estate, is void, as being inconsistent with the interest given." (*Per* Turner, V.-C., in *Rochford* v. *Hackman*, 9 Hare, at p. 480.)

Conditional limitation.

On the other hand, a life estate can be limited until the happening of a certain event (*e.g.*, bankruptcy or an attempt to alienate).

"In the well-known case of *Rochford* v. *Hackman* (*supra*), Lord Justice Turner decided (and his decision has been followed again and again, and has never, that I know of, been dissented from), that if there be a gift of a life estate to A., and then a remainder over to other people, with a proviso that the life estate shall cease upon a certain event happening, that is not a clause of forfeiture, but it is a limitation till that event happens, and then over. The very same construction has been applied in a case of an annuity for life, the estate being given subject to that annuity." (*Per* Kay, L.J., in *Adams* v. *Adams*, [1892] 1 Ch. at p. 376.)

Annuity.

Where a testator directed that an annuity should be purchased for A., a condition that if A. should sell his annuity it should cease and fall into residue was held void (*Hunt-Foulston* v. *Furber*, 3 Ch. D. 285); but apparently such a condition may be made effectual by a gift over. (See *Roper* v. *Roper*, 3 Ch. D. at p. 721; and *Re Mabbett*, [1891] 1 Ch. at p. 713.)

Conditional limitation.

The distinction between a condition and a conditional limitation is sometimes refined. (See Chitty, J.'s judgment in *Re Machu*, 21 Ch. D. 838.)

Gift over on intestacy.

Gift over on intestacy.—"The law has said, that if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void." (*Per* Turner, L.J., in *Holmes* v. *Godson*, 8 D. M. & G. at p. 165, followed by Sargant, J., in *Re Ashton*, [1920] 2 Ch. 481; and see *Shaw* v. *Ford*, 7 Ch. D. at p. 674.)

"It is a rule that, where a money fund is given to a person absolutely, a condition cannot be annexed to the gift, that so much as he shall not dispose of shall go over to another person." (*Per* Lord Truro, C., in *Watkins* v. *Williams*, 3 Mac. & G. at p. 629.)

"Whether the subject of the gift be real or personal property, a gift over in the event of the decease and intestacy of the party to whom an absolute interest is given by the will, is repugnant and void." *Per* Page-Wood, V.-C., in *Barton* v. *Barton*, 3 K. & J. at p. 515.)

Restraint on anticipation.

Power of the Court.

Restraint on anticipation.—The law permits a married woman to be restrained from anticipation, but the restraint is only operative during coverture. By section 7 of the Conveyancing Act, 1911 (which repeals section 39 of the Conveyancing Act, 1881), "where a married woman is restrained from anticipation or from alienation in respect of any property or any interest in property belonging to her, or is by law unable to dispose of or bind such property or her interest therein, including a reversionary interest arising under her marriage settlement, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in such property." This section is re-enacted by section 169 of the Law of Property Act, 1925.

The Court has sometimes released the restraint in order to enable a married woman to comply with a condition. (*Re Grove*, [1919] 1 Ch. 249.)

The particular consequence of a condition being void may depend upon whether the condition is precedent or subsequent, whether the property to which it is attached is real or personal, and whether there is a gift over on breach or non-performance of the condition.

If condition subsequent is void, gift is absolute.

RULE. If real or personal property is given subject to a condition subsequent which is void or becomes impossible of performance, the devise or bequest is absolute. (*Re Beard*, [1908] 1 Ch. 383.)

"The conditions to which I have referred are conditions subsequent, the object of the conditions being to determine and divest (upon the happening of the event specified) estates or interests antecedently vested. If, therefore, the condition be void as being contrary to public policy, the gift will be absolute both as regards the real and personal estate." (*Per* Swinfen Eady, J., in *Re Beard*, [1908] 1 Ch. at p. 386.)

Devise subject to void condition precedent is void.

RULE. If land is devised subject to a condition precedent which is void or becomes impossible to be performed, the devise is void. (Co. Lit. 206.)

"In case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute: but if the condition precedent be impossible, no estate or interest shall grow thereupon." (Co. Lit. 206.)

Bequest subject to void condition precedent is good if condition impossible *ab initio* or involves *malum prohibitum*.

RULE. If personal property is bequeathed subject to a condition precedent which is void for involving *malum prohibitum*, or as being impossible *ab initio* the bequest is absolute (*Wren* v. *Bradley*, 2 De G. & S. 49); but where a condition involves *malum in se* or the condition has since become impossible by act of God, the bequest is void. (*Re Moore*,

39 Ch. D. 116; *Dawson* v. *Oliver Massey*, 2 Ch. D. at p. 755.)

Effect of condition precedent being void.

"The doctrine that conditions precedent as well as conditions subsequent which are against the policy of the law are treated as void in cases of legacies of personal estate, and that the legacy 'stands pure and simple,' is distinctly recognised by Lord Hardwicke in *Reynish* v. *Martin* [3 Atk. at p. 332]: and the rules borrowed from the Civil Law were held by the late Master of the Rolls to apply to a mixed fund of the proceeds of real and personal estate: *Bellairs* v. *Bellairs* [L. R. 18 Eq. 510]. I assume, therefore, that if this is to be treated as a legacy given upon a precedent condition or defeasible by a subsequent condition which is bad as involving that which is *malum prohibitum*, the legacy must take effect, discharged of the condition." (*Per* Kay, J., in *Re Moore*, 39 Ch. D. at p. 122.)

"But with respect to legacies out of personal estate, the Civil Law, which in this respect has been adopted by Courts of Equity, differs in some respects from the Common Law in its treatment of conditions precedent; the rule of the Civil Law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the Civil agrees with the Common Law in holding both gift and condition void." (Jarman on Wills; quoted by Cotton, L.J., 39 Ch. D. at p. 128.)

Condition impossible by act of God.

In *Dawson* v. *Oliver Massey* (2 Ch. D. 753, at p. 755), Jessel, M.R., observes: "The rule is that where a condition precedent annexed to a legacy becomes impossible by the act of God, the legatee takes nothing. It is otherwise if the condition is a condition subsequent; there the

legatee takes absolutely, because there is nothing to take the legacy away from him."

In some cases a literal performance of a condition precedent is not necessary. (*Re Packard*, [1920] 1 Ch. 596.)

Restraint of marriage.

General restraint of marriage.—"It seems to have been laid down by a great number of cases that what is called a general restraint upon marriage is against the policy of the law. . . . A condition subsequently annexed by way of forfeiture to a marriage is therefore void. That is the law both as to man and woman." (*Per* James, L.J., in *Allen* v. *Jackson*, 1 Ch. D. at p. 403; see *Re Wright*, [1907] 1 Ch. 231.)

Condition in partial restraint of marriage.

RULE. Although a condition subsequent not to dispute a will or in partial restraint of marriage annexed to a bequest of personalty is *in terrorem* and void, yet it is valid and effectual if there is a gift over on breach of the condition. (*Cleaver* v. *Spurling*, 2 P. Wms. 526; *Re Whiting's Settlement*, [1905] 1 Ch. 96.)

It is not easy to ascertain what kinds of conditions in restraint of marriage are *in terrorem* only when annexed to gifts of personalty with no gift over.

Condition not to marry—

The following conditions in partial restraint of marriage appear not to be void as against public policy:—

Scotchman,

(1) Conditions not to marry a person of a particular class, as a Scotchman (*Perrin* v. *Lyon*, 9 East, 170), or a papist. (*Duggan* v. *Kelly*, 10 Ir. Eq. R. 295.)

Christian,

(2) Conditions not to marry except one of a large class, as a Jew. (*Hodgson* v. *Halford*, 11 Ch. D. 959.)

except with certain ceremonies.

(3) Conditions not to marry except with certain ceremonies, as according to the rites of Quakers. (*Haughton* v. *Haughton*, 1 Moll. 611.)

Against re-marriage of widow.

(4) Conditions against the re-marriage of a widow. (*Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Newton* v. *Marsden*, 2 J. & H. 356).

(5) Conditions against the second marriage of a man. (*Allen* v. *Jackson*, 1 Ch. D. 399.) Second marriage of man.

(6) A condition reducing an annuity on marriage. (*Re Hewitt*, [1918] 1 Ch. 458, where the principles are discussed.) Reducing annuity.

(7) Conditions requiring consent to marriage. Conditions requiring consent to marriage.

"It is an established rule in the Civil Law, and has long been the doctrine of this Court, that where a personal legacy is given to a child on condition of marrying with consent, that this is not looked on as a condition annext to the legacy, but as a declaration of the testator *in terrorem*." (*Per* Lord Hardwicke, C., in *Reynish* v. *Martin*, 3 Atk. at p. 331; quoted by Stirling, J., in *Re Nourse*, [1899] 1 Ch. at p. 69.)

Such conditions are effectual in the case of personalty if accompanied by a gift over (*Re Whiting's Settlement*, [1905] 1 Ch. 96); but in the case of land such a condition subsequent is good, without a gift over, as a limitation. (*Fry* v. *Porter*, 1 Mod. 300); in a blended gift of realty and personalty, the rule as to personalty applies. (*Re Pettifer*, [1900] W. N. 182.) Annexed to land good without a gift over.

Conditions precedent to marry with consent also appear to be *in terrorem*, unless there is a gift over, except in the following cases:— Condition precedent to marry with consent.

(i) Where there is a provision for the legatee in case the condition is not performed. (*Re Nourse*, [1899] 1 Ch. 63.)

(ii) Where the marriage with consent is only one of two events, in either of which the legatee would take the legacy. (*Re Brown's Will*, 18 Ch. D. 61.)

(iii) Where the consent is only required in case of marriage during minority. (*Stackpole* v. *Beaumont*, 3 Ves. 89.)

Where the consent of parents is required, this apparently is construed as meaning the consent of the parents or parent, if any (*Dawson* v. *Oliver Massey*, 2 Ch. D. 753); but this doctrine does not extend to the case where the consent of guardians is required. (*Re Brown's Will*, 18 Ch. D. 61.) A marriage in the testator's lifetime with the Consent of parents to marriage.

testator's consent fulfils the condition. (*Re Park*, [1910] 2 Ch. 322.)

Interest till marriage.

A life interest till marriage is, in general, good as a limitation, not as a condition. (See above, p. 56, and *Re Moore*, 39 Ch. D. 116.)

Roman Catholic.

As to the meaning of an infant being a Roman Catholic, where there is a bequest provided he shall not be a Roman Catholic, see *Re May*, [1917] 2 Ch. 126.

CHAPTER VII.

Satisfaction—Ademption.

Presumption against double portions.

Both satisfaction and ademption (in the sense in which the word is used in this chapter) arise from the presumption of Courts of Equity against double portions. Broadly, ademption resembles the revocation of a legacy; satisfaction is the discharge of an obligation by means of a legacy. These presumptions of equity may be rebutted by parol evidence.

ADEMPTION OF LEGACIES.

Legacy adeemed by an advance.

Rule. In the absence of a contrary intention, there is a presumption that an advance made by a father adeems a legacy given as a portion either wholly or *pro tanto*. (*Meinertzagen* v. *Walters*, L. R. 7 Ch. 670.)

"Where a father makes provision for his children, leaving them legacies, and afterwards gives a portion to one of those children, it is supposed, from what is known to be the ordinary intention of testators, that he did not intend to make any real difference between the children, and that the child advanced in his lifetime takes the advance *pro tanto* by way of ademption." (*Per* James, L.J., L. R. 7 Ch. at p. 672.)

But "a rule designed to produce equality among children cannot be extended so as to reduce their shares for the benefit of a stranger." (*Per* Swinfen Eady, J., in *Re Heather*, [1906] 2 Ch. at p. 234.)

The presumption does not extend to an advance by a grandfather unless he has placed himself *in loco parentis* to the advanced grandchild. (*Re Dawson*, [1919] 1 Ch. 103.)

Presumption may be rebutted by parol evidence.

This rule is not a rule of administration or of construction, but a mere presumption. (See Introduction, pp. 3, 4.) Consequently it can be rebutted not merely by the words of the will, but by parol evidence; and if parol evidence is brought against the presumption, then parol evidence is admitted in support of it.

"In order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen upon reflection that there are two presumptions really which are to be considered, and not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion. . . . But, supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked. That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and there the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend. This, like the former, is a presumption which may be rebutted. The circumstances may show that a gift given during the lifetime is not intended as an advancement of the bequest." (*Per* Bowen, L.J., in *Re Lacon*, [1891] 2 Ch. at p. 497.)

Legacy for a purpose adeemed by subsequent gift.

RULE. In the absence of a contrary intention there is a presumption that a legacy given for a particular purpose is adeemed by a gift made by the testator after the will for the same purpose. (*Re Pollock*, 28 Ch. D. 552.)

"The presumptions arising out of the parental relation do not of course extend to any case in which the legatee is a

stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised *primâ facie* in favour of ademption. And it is clear from the authorities, that evidence of the circumstances under which the subsequent gift was made including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not) may be admissible in such a case." (*Per* Selborne, C., in *Re Pollock*, 28 Ch. D. at p. 556, quoted by Joyce, J., in *Re Aynsley*, [1914] 2 Ch. at p. 427). But parol evidence which is not substantially contemporaneous is not admissible. (*Re Aynsley*, [1915] 1 Ch. 172.)

A gift of War Bonds for a particular purpose satisfies a legacy in a prior will for the same purpose to the extent of the price paid for the bonds. (*Re Jupp*, [1922] 2 Ch. 359.)

SATISFACTION OF PORTIONS BY LEGACIES.

Legacy to a child is in satisfaction of a portion.

RULE. In the absence of a contrary intention, there is a presumption that a provision by a father's will for his child is to be taken in satisfaction, either wholly or *pro tanto*, of an existing obligation by the father to provide a portion. (*Thynne* v. *Glengall*, 2 H. L. C. 131.)

"Equity leans against double portions, and the general rule is that wherever a legacy given by a parent, or a person standing *in loco parentis*, is as great as or greater than a portion previously secured to the legatee upon marriage or otherwise, a presumption arises that the legacy was intended as a satisfaction of the portion. If the legacy is less than the portion, a presumption arises that it was intended as a satisfaction *pro tanto*." (*Per* Eady, J., in *Re Blundell*, [1906] 2 Ch. at p. 226.)

Stirling, J., has expressed the opinion that *primâ facie* a mother is not *in loco parentis* for the purpose of the rule against double portions. (*Re Ashton*, [1897] 2 Ch. at p. 578.)

A share of residue is on the same footing as a pecuniary legacy as regards the rule against double portions (*Thynne* v. *Earl of Glengall*, 2 H. L. C. 131); but the presumption may be rebutted by differences in the nature of the property or in the mode in which it is to be enjoyed. (*Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; see Jarman on Wills, p. 1168, for details.)

It often happens that the persons interested under the settlement are not the same as those interested under the gift in the will, so that those who take nothing under the will cannot be held to have lost their benefit under the settlement.

"In cases of satisfaction, where the testator has first entered into a covenant to settle a sum of money upon his child for life, with remainder to the issue of the marriage, that covenant is not satisfied by a bequest of a like sum of money to that child absolutely; it is only satisfied *pro tanto*, that is, so far as the child is concerned. So also if the bequest be to the children of the marriage, omitting the parent, that may be a satisfaction of so much of the covenant as relates to them, but is no satisfaction of the covenant to the parent. Accordingly, in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage alone the children may elect to take under the will, instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will." (*Per* Lord Romilly in *Lord Chichester* v. *Coventry*, L. R. 2 H. L. at p. 92.)

Election.

Where the covenantee takes no interest directly under the will, but is only derivatively interested, the doctrine of satisfaction does not apply. (*Re Blundell*, [1906] 2 Ch. 222.)

Presumption may be

As the rule is a presumption, and not a rule of construction, parol evidence is admissible to rebut the presumption.

rebutted by parol evidence.

"It is important not to relax the rule against admitting parol evidence to construe wills—that is, evidence to show what the will means. That you cannot do, unless there is a latent ambiguity—for instance, as to two legatees of the same name—or as to the meaning of terms of art. . . . Here there is a daughter and her family entitled to a portion under a settlement, and then a will, in which you find a provision in favour of the same daughter and some of her family. You do not want to construe that; but the question arises, whether both portions are to be paid. You look at the will for some expression of intention whether one or both are to be paid. If you find no expression, then you are driven to a presumption of law, which only arises in the absence of an expressed intention to give a double portion. That is entirely independent of the construction of the will. When you come to a presumption to imply an intention in the will, then the rule always is that you may admit parol evidence to rebut such presumption." (*Per* Cotton, L.J., in *Re Tussaud's Estate*, 9 Ch. D. at p. 374.)

When parol evidence is adduced to rebut the presumption, parol evidence is admissible to support the presumption. (*Powys* v. *Mansfield*, 3 Myl. & Cr. 359.)

Parol evidence admissible to prove that testator is *in loco parentis*.

In cases of double portions parol evidence is admissible not only to rebut the presumption, but to prove the fact (which gives rise to the presumption) that the testator meant to put himself *in loco parentis*.

"If the acts of a party standing *in loco parentis* raise, in equity, a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is to depend, namely, whether, in the language of Lord Eldon, he had *meant* to put himself *in loco parentis;* and, as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose." (*Per* Lord Cottenham, C., in *Powys* v. *Mansfield*, 3 Myl. & Cr. at p. 370.)

Covenant to leave money may be satis-

Covenant to leave a sum of money.—A covenant to leave a sum of money or a specific share of the testator's estate

fied by intestacy.

may be satisfied by permitting a share of the estate of greater value than the amount to devolve under an intestacy on the covenantee. (*Blandy* v. *Widmore*, 1 P. Wms. 324; *Garthshore* v. *Chalie*, 10 Ves. jun. 1.) This does not apply to a covenant to leave an annuity. (*Salisbury* v. *Salisbury*, 6 Hare, 526.)

"Where the husband has bound himself to fulfil some obligation by the payment of money or by doing an act equivalent to the payment of money at the time of his death (whether it be at the time of his death, or within six months after, makes no difference), that obligation is satisfied if, by dying intestate, he allows the law to confer a benefit on the covenantee equivalent to that which he had bound himself to confer" (*per* Shadwell, V.-C., in *Lang* v. *Lang*, 8 Sim. at p. 465); but it is otherwise where the covenant is to pay a sum in the lifetime of the covenantor. (*Ib.*)

SATISFACTION OF DEBTS BY LEGACIES.

Debt is satisfied by a legacy.

RULE. In the absence of a contrary intention there is a presumption that a debt is satisfied by a legacy of equal or greater amount. (*Talbot* v. *Shrewsbury*, Pr. Ch. 394; *Re Rattenberry*, [1906] 1 Ch. 667.)

In *Talbot* v. *Shrewsbury* (*supra*), it was said that: "If one being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, that this shall, nevertheless, be in satisfaction of the debt, so as that he shall not have both the debt and the legacy; but if such a legacy were given upon a contingency, which, if it should not happen, the legacy would not take place, in that case, though the contingency does actually happen and the legacy thereby became due, yet it shall not go in satisfaction of the debt; because a debt which is certain shall not be merged or lost by an uncertain and contingent recom-

pense; for whatever is to be a satisfaction of a debt ought to be so in its creation, and at the very time it is given, which such contingent provision is not."

"The rule is that a legacy to a creditor of an amount equal to or greater than the debt is *primâ facie* to be considered a satisfaction of the debt." (*Per* Eady, J., in *Re Rattenberry*, [1906] 1 Ch. at p. 670.)

Presumption may be rebutted:

This rule, like the previous ones, being only a presumption, parol evidence is admissible to rebut it, and then again in support of it. (*Re Horlock*, [1895] 1 Ch. 516, 523.)

by parol evidence,

There is a rule of construction that a direction in the will to pay debts and legacies (*Chancey's Case*, 1 P. Wms. 408), or to pay debts alone (*Re Huish*, 43 Ch. D. 260), rebuts the presumption.

by direction to pay debts.

"The presumption of satisfaction through a long series of authorities has been held to be rebutted by a direction to pay debts and legacies, and also by a direction to pay debts alone." (*Per* Astbury, J., in *Re Hall*, [1918] 1 Ch. at p. 567.)

If the debt was contracted after the will, it is clear that the legacy cannot have been intended to be in satisfaction of the debt. (*Thomas* v. *Bennett*, 2 P. Wms. at p. 343.)

by difference between debt and legacy.

Almost any difference between the debt and the legacy (except that the legacy is greater) is sufficient to rebut the presumption; but the fact that a legacy is, in general, not payable until twelve months after the testator's death is not enough to rebut the presumption. (*Re Rattenberry*, [1906] 1 Ch. 667, and the cases there referred to.)

Ademption of legacy by payment of debt.

If the testator pays off the debt he adeems a legacy of equal amount given in satisfaction of it.

"Though, no doubt, the Court is not disposed to hold there is satisfaction if it can help it, and has taken hold of slight circumstances to rebut the presumption against double portions, yet it is clearly established that if there is a legacy of equal amount with a debt, the creditor cannot take both the legacy and the debt unless there is something to take the case out of the general rule. In the present case there is nothing of the sort, and it seems to me that

this legacy given by the codicil must be taken to have been given in satisfaction of the debt; and the presumption of law, in the absence of any evidence to rebut it, seems to me to put the matter in precisely the same position as if it had been stated in the codicil that the legacy was to pay the debt. That being so, the testator, having paid off the debt in his lifetime, his estate is relieved from the payment of the legacy." (*Per* North, J., in *Re Fletcher*, 38 Ch. D. at p. 376.)

CHAPTER VIII.

Election (*a*).

TESTATORS sometimes, either intentionally or by mistake, affect to bequeath what they have in fact no power to dispose of; in such cases the Courts attach an equitable obligation to any benefits taken under the will by the owner of the property so dealt with, viz., that:—

A person cannot both take under a will and claim against it.

RULE. If a testator by will purports to give the property of A. to B., and gives property of his own to A., if A. will not confirm the gift to B., B. shall receive compensation out of the property given to A. (*Blake* v. *Bunbury*, 1 Ves. jun. at p. 523; *Dillon* v. *Parker*, 1 Sw. 359; *Gretton* v. *Haward*, *ib.* 409; *Schroder* v. *Schroder*, Kay, 578; *Re Macartney*, [1918] 1 Ch. 300.)

Illustrations.

Thus, if a testator, having fee simple land and entailed land, devises the entailed to B. (a stranger) and the fee simple land to A., the heir in tail, A. must elect either to give up to B. the entailed land, or forfeit to him the whole or an equivalent part in value of the fee simple land. (See *Noys* v. *Mordaunt*, 2 Vern, 581.)

So, if under the old law, a testator devised the real estate of which he should be seised *at his death* (*Churchman* v. *Ireland*, 1 R. & My. 250; *Schroder* v. *Schroder*, Kay, 578), the heir, if taking benefits under the will, was put to election as regards after-acquired lands.

So, if the testator, having purchased stock or shares in

(*a*) Part of this chapter is taken from a MS. of the late Mr. Vaughan Hawkins.

the joint names of himself and his wife by way of advancement, afterwards bequeaths the same specifically, the widow is put to election. (*Shuttleworth* v. *Greaves*, 4 My. & Cr. 35; *Grosvenor* v. *Durston*, 25 Beav. 97.)

Lord Hatherley's statement.

"The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect." (*Per* Lord Hatherley in *Cooper* v. *Cooper*, L. R. 7 H. L. at p. 63, quoted by Eve, J., in *Re Williams*, [1915] 1 Ch. at p. 455.)

Lord Eldon's statement of the principle.

"In our Courts we have engrafted upon this primary doctrine of election, the equity, as it may be termed, of *compensation*. Suppose a testator gives his estate to A. and directs that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the Courts of Equity hold that another condition is to be implied, as arising out of the will, and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A., in consideration of his giving his estate to B.; if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him." (*Per* Lord Eldon in *Ker* v. *Wauchope*, 1 Bli. at p. 25.)

According to Jessel, M.R., the doctrine of compensation creates an equitable charge upon the property out of which the compensation is to be made. (*Pickersgill* v. *Rodger*, 5 Ch. D. 163.)

It is immaterial whether the testator supposed that he had, or knew that he had not power to dispose of the property in question. (*Re Harris*, [1909] 2 Ch. 206.)

Persons under a disability.—The Court elects on behalf of infants (*Re Montagu*, [1896] 1 Ch. 549). The ordinary practice is to direct an inquiry to ascertain which course is beneficial for the infant. The Court elects on behalf of infants.

In the case of married women under the old law the authorities are not consistent, but the better opinion seems to be that in such a case the Court will elect on her behalf. (*Cooper* v. *Cooper*, L. R. 7 H. L. 53.) Married women.

Restraint on anticipation.—A married woman restrained from anticipation is not bound to elect, because she cannot alienate the interest so restrained, but the doctrine of election applies to a spinster to whom an interest with a restraint on anticipation is given by the same instrument as that which gives rise to the question of election. (*Re Tongue*, [1915] 1 Ch. 391; [1915] 2 Ch. 283; *Re Hargrove*, [1915] 1 Ch. 398.) Restraint on anticipation.

Powers of appointment.—But A. (the real owner) is put to election only by bounty proceeding from the testator himself, and not by an appointment under a special power; in the latter case Equity cannot lay hold of the appointed property so as to compensate B. (*Bristow* v. *Warde*, 2 Ves. jun. 336; *Re Fowler's Trust*, 27 Beav. 362.) Thus, if under a power to appoint to children the testator appoints part to them and the remainder to a grandchild, the children may claim both under the appointment to them and the rest as unappointed. Special power of appointment.

Where there is an appointment which is void as infringing the rule against remoteness or the rule in *Whitby* v. *Mitchell* (*supra*, Chap. II.), and a gift to the person entitled in default of appointment, there was a difference of opinion as to whether a case of election arose. Mr. Theobald, in the preface to the seventh edition of his book on Wills, argued with great force that there must be a case of election, but in *Re Nash* ([1910] 1 Ch. 1), following certain earlier decisions, the Court of Appeal held that in such a case the person taking in default of appointment is not put to his election. In *Re* No election where gift void for remoteness.

Oliver's Settlement ([1905] 1 Ch. at p. 197), Farwell, J., said: "The doctrine of election is a rule of equity by virtue of which the Court of Equity compels a recipient of the testator's bounty to conform to all the legal provisions of the will. It is somewhat startling that this Court should be asked to extend it to illegal provisions, and to apply its doctrines for the purpose of enabling a testator to evade a rule of law founded on public policy. . . . Kekewich, J., has said, and it is the basis of his judgment, that it is immaterial whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. With all deference to him, the difference appears to me to be vital. In the one case the testator openly and avowedly breaks the general law, and asks the Court of Equity to participate in his illegal act by giving effect to it; in the other he merely attempts to exceed the limits set to his power by the donor thereof in the particular case—limits which the donor might have extended without any breach of general law. Thus, limitations which infringe the rule against perpetuity are void on the face of the will, but a devise of Blackacre by a testator who has no interest therein is not illegal, nor is it void on the face of the will, but depends on an inquiry into the testator's title." It should be noticed that in this case the appointment was also bad because the appointees were not objects of the power.

Foreign heir.

Foreign heir.—A person who succeeds as heir to immoveables in a foreign country is put to his election (*Re Ogilvie*, [1918] 1 Ch. 492), but when a testator attempts to impose trusts on land in a foreign country where trusts are not recognised, the foreign heir has not to give effect to such trusts. (*Brown* v. *Gregson*, [1920] A. C. 860.)

Adeemed gift does not raise an election.

Adeemed gift.—A gift which is afterwards adeemed or revoked cannot raise a case of election; thus, where the testator, under the old law, specifically devised an estate contracted to be purchased, and afterwards took a conveyance to uses to bar dower, so that the devise was inoperative,

the heir was not put to election. (*Plowden* v. *Hyde*, 2 Sim. (N.S.) 171.)

What terms of gift raise an election.

What terms of gift raise an election.—The intention of the testator to dispose of that which is not his own must clearly appear to raise a case of election. (See *Wintour* v. *Clifton*, 8 De G. M. & G. 641.) Thus, a devise of "all my real estate wheresoever situate" does not put a Scotch heir to election. (*Maxwell* v. *Maxwell*, 2 De G. M. & G. 705; *Allen* v. *Anderson*, 5 Hare, 163.) So a bequest of "all my funded property or estate whatsoever" was held not to put the widow to election as to stock standing in the joint names of the testator and herself, although at the date of the will the testator had no other funded property. (*Dummer* v. *Pitcher*, 2 My. & K. 262; so *Maddison* v. *Chapman*, 1 Jo. & H. 470—a devise of "all my real and personal property at B., L. or elsewhere," the testator having only a lien on an estate at L. purchased by his wife.)

And a specific devise imports, *primâ facie*, a devise subject to existing charges, and does not put incumbrancers or portionists to election. (*Stephens* v. *Stephens*, 1 De G. & J. 62.) In *Stephens* v. *Stephens* the testator, being tenant for life with remainder to trustees for 1,000 years, to raise £10,000 for younger children, remainder to A. in tail, devised the estate to A. in fee: but it was held that the younger children were not put to election.

But it is settled that a specific gift of property in which the testator has only an undivided share puts a co-owner to election, as a gift of "my messuage" or "farm" at A. (*Padbury* v. *Clark*, 2 Mac. & G. 298; *Howells* v. *Jenkins*, 2 J. & H. 706), or "cottages" (*Miller* v. *Thurgood*, 33 Beav. 496), or shares (*Shuttleworth* v. *Greaves*, 4 My. & Cr. 35), or *present* funded stock. (*Grosvenor* v. *Durston*, 25 Beav. 97.)

Reversionary interest.

Where there is a specific gift of property in which the testator has only a reversionary interest, the question is on the whole will whether the testator intends to dispose of the whole interest, or of the reversion only. (*Wintour* v. *Clifton*, 21 Beav. 447; 8 De G. M. & G. 641; *Lord Rancliffe*

v. *Parkyns*, 6 Dow, 149; *Welby* v. *Welby*, 2 V. & B. 187; *Usticke* v. *Peters*, 4 K. & J. 437.) If the will subjects the property along with property belonging to the testator in possession, to powers of jointuring, charging, &c., exercise-able only when the devisees should be in possession of *the whole* (*Wintour* v. *Clifton*), or if the property is specially made the fund to secure an annuity immediately payable (*Usticke* v. *Peters*), a case of election arises.

Parker, J.'s statement.

The general principle is thus stated by Parker, J.: "To raise a case of election under a will it must, I think, be reasonably clear from the will itself, having regard only to the circumstances under which it was made, and excluding evidence of intention (*a*), that the testator intended to dispose of property which in fact was not his own. Whether he knew it was not his own is, it seems to me, immaterial. Where the property is sufficiently identified on the face of the will no difficulty arises. Where the property is only described in terms more or less general, a case of election can seldom be raised, and even where at the date of the will the testator had no property of his own falling within the general description the gift may, at any rate since the Wills Act, 1837, have been meant to pass any after-acquired property falling within the general description." (*Re Harris*, [1909] 2 Ch. at p. 209.)

No election between different clauses of the will.

"The rule as to election is to be applied as between a gift under a will and a claim *dehors* the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will." (*Per* James, V.-C., in *Wollaston* v. *King*, L. R. 8 Eq. at p. 174.)

When compensation ascertained.

The amount of compensation is to be ascertained as at the time of the death of the testator. (*Re Hancock*, [1905] 1 Ch. 16.)

Class.

The method of working out the compensation where the property belongs to a class and the testator purports to give it to some members of the class and to strangers will be found in *Re Booth*, [1906] 2 Ch. 321.

(*a*) The *dictum* of Jessel, M.R., in *Pickersgill* v. *Rodger* (5 Ch. D. at p. 170), seems to be incorrect. (*Galvin* v. *Devereaux*, [1903] 1 Ir. 185.)

If a testator leaves two wills dealing with his property in two different countries, they together form one testamentary disposition for the purpose of the doctrine of election. (*Douglas-Menzies* v. *Umphelby*, [1908] A. C. 224.) Two wills.

The doctrine of compensation does not apply to the case of a person electing to take under the instrument which gives rise to the election. (*Re Lord Chesham*, 31 Ch. D. 466.)

ELECTION WHERE PORTIONS ARE SATISFIED BY LEGACIES.

Since the person entitled to the benefit of an obligation cannot be compelled to renounce it, we have the following rule:—

RULE. Where a gift by will is in satisfaction of an existing obligation binding on the testator to provide a portion, the person entitled to the benefit of the obligation may elect to take the benefit under it rather than the gift under the will. (*Thynne* v. *Glengall*, 2 H. L. C. 131.) Where portion is satisfied by a legacy, legatee may elect against the will.

"When a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he give benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant, or whether they will take under the will." (*Per* Lord Romilly, in *Lord Chichester* v. *Coventry*, L. R. 2 H. L. at p. 91.)

No case for election arises in the case of such of the objects who benefit under the preceding covenant, but do not take a benefit under the will. Only those who take under the will are put to election.

"In cases of satisfaction, where the testator has first entered into a covenant to settle a sum of money upon his

child for life, with remainder to the issue of the marriage, that covenant is not satisfied by a bequest of a like sum of money to that child absolutely; it is only satisfied *pro tanto*, that is, so far as the child is concerned. So, also, if the bequest be to the children of the marriage, omitting the parent, that may be a satisfaction of so much of the covenant as relates to them, but it is no satisfaction of the covenant to the parent.

"Accordingly in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage alone, the children may elect to take under the will instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will." (*Per* Lord Romilly in *Lord Chichester* v. *Coventry*, L. R. 2 H. L. at p. 92; see *Re Vernon*, 95 L. T. 48.)

CHAPTER IX.

Personal Representatives.

ALTHOUGH the various rules of administration, so far as they affect the beneficial interests to be taken under a will, yield to a contrary intention expressed in the will, it is not now possible for the testator to prevent his estate from vesting in his personal representatives; but this has been arrived at by successive stages.

Personalty vests in the personal representatives.

Trust and mortgage estates.

Real estate.

Notwithstanding any contrary intention expressed in the will the deceased's personal estate always vested in his legal personal representatives. (See *per* Lord Haldane, C., in *Attenborough* v. *Solomon*, [1913] A. C. at p. 82.) Since 1881, by virtue of section 30 of the Conveyancing Act, 1881, trust and mortgage estates of the deceased (other than land of copyhold or customary tenure vested in the tenant on the court rolls on trust or by way of mortgage: see Copyhold Act, 1894, s. 88) vested in his personal representatives. Since 1897, by virtue of section 1 of the Land Transfer Act, 1897, the real estate of the deceased, other than legal interests in copyholds or customary land (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583), vested in his personal representatives, unless he died intestate without an heir. (*In bonis Hartley*, [1899] p. 40, in which *Wentworth* v. *Humphrey*, 11 A. C. 619 was not cited.)

Personal property appointed under a general power.

Real property appointed.

General Powers of Appointment.—If the testator had a general power of appointment over personal property which he exercised by his will such property passed to the executor. (See *Re Hadley*, [1909] 1 Ch. 20.)

After 1897, by virtue of section 1, sub-section 2 of the Land Transfer Act, 1897, real property similarly appointed

(other than legal interests in copyholds or customary freeholds) vested in the personal representatives or representative of the deceased.

Copyholds abolished.

On January 1, 1926, all land of copyhold or customary tenure is enfranchised. (Law of Property Act, 1922, s. 128; Law of Property Act (Postponement Act), 1924.)

Part I. of the Land Transfer Act, 1897, has been repealed and the law after 1925 as to real estate is now contained in section 1, sub-section (1) of the Administration of Estates Act, 1925, which runs as follows:—

Administration of Estates Act, 1925, s. 1.

"Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person."

This binds the Crown (section 57, sub-section (1) of the Administration of Estates Act, 1925.)

Real estate appointed under a general power.

"A testator shall be deemed to have been entitled at his death to any interest in real estate passing under any gift contained in his will which operates as an appointment under a general power to appoint by will, or operates under the testamentary power conferred by statute to dispose of an entailed interest." (Section 3, sub-secton (2).)

Tenant in tail in possession may appoint by will.

After 31st December, 1925, all property real and personal may be entailed in equity, but only by such expressions as were necessary in a deed to create an estate tail in freeholds (section 130, sub-section (1) of the Law of Property Act, 1925), and a tenant in tail of full age in possession may devise or bequeath his estate tail or entailed interest as if he had barred the entail (section 176, sub-section (1) of the Law of Property Act, 1925).

Thus after 31st December, 1925, we have the following:—

Rule after 1925.

RULE. All the property to which a deceased person is entitled for an interest not ceasing on his

death and all property which he appoints by will in exercise of a general power of appointment devolves on his personal representative or representatives.

Settled land.

Exception.—Settled Land.—Where the deceased was tenant for life under a settlement the scheme of the new legislation is that the whole fee simple shall be vested in him; but it might be inconvenient for his executors to have to pay the duties in respect of the settled property and convey it to the next person entitled under the settlement; consequently it is provided that the trustees of the settlement should be special executors for the purpose of the Settled Land Act, 1925. Section 22 of the Administration of Estates Act, 1925, runs:—

S. 22 of the Administration of Estates Act, 1925.

"(1) A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land.

"In this subsection 'settled land' means land vested in the testator which was settled previously to his death and not by his will.

"(2) A testator may appoint other persons either with or without such trustees as aforesaid or any of them to be his general executors in regard to his other property and assets."

S. 24 (1).

And by section 24, sub-section (1): "The special personal representatives may dispose of the settled land without the concurrence of the general personal representatives, who may likewise dispose of the other property and assets of the deceased without the concurrence of the special personal representatives."

UNDIVIDED SHARES.

Undivided shares.

After 31st December, 1925, it will not be possible to create undivided shares in land at law, and by section 34, sub-section (3) of the Law of Property Act, 1925, it is provided that—

Law of Property Act, 1925, s. 34 (3).

"A devise bequest or testamentary appointment, coming into operation after the commencement of this Act, of land to two or more persons in undivided shares shall operate as a devise bequest or appointment of the land to the trustees (if any) of the will for the purposes of the Settled Land Act, 1925, or, if there are no such trustees, then to the personal representatives of the testator, and in each case (but without prejudice to the rights and powers of the personal representatives for purposes of administration) upon the statutory trusts hereinafter mentioned."

The statutory trusts.

The statutory trusts are "upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, cost of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land." (Law of Property Act, 1925, s. 35.)

POWERS OF EXECUTORS AND TRUSTEES.

Executor may sell or mortgage personalty.

RULE. The personal representative of the deceased has power to sell or mortgage any part of the deceased's personal estate. (*Vane* v. *Rigden*, L. R. 5 Ch. 663.)

"The general rule both of law and equity is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they cannot be followed by the testator's creditors. It would be monstrous if it were otherwise; for then no one would deal with an executor." (*Per* Lord Mansfield, C.J., in *Whale* v. *Booth*, 4 T. R. 625.)

"As long ago as the case of *Scott* v. *Tyler* [2 Dick. 712, 725] Lord Thurlow expressed his opinion clearly to be that the executor is at liberty either to sell or to pledge the assets of the testator. In fact, he has complete and absolute con-

trol over the property, and it is for the safety of mankind that it should be so; and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor." (*Per* Lord Hatherley, C., in *Vane* v. *Rigden*, L. R. 5 Ch. at p. 668.)

"The executor has an absolute right to dispose of the assets of his testator by sale pledge or mortgage for the purpose of obtaining money to pay debts." (*Per* Warrington, J., in *Re Jones*, [1914] 1 Ch. at p. 746.)

Executor selling or mortgaging presumed to be acting in that capacity.

"It appears to me that I have the high authority of Lord Cairns and Lord Cranworth for saying that where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shows the contrary; and further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity." (*Per* Stirling, J., in *Re Venn and Furze's Contract*, [1894] 2 Ch. at p. 114.)

Executor residuary legatee.

"I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator." (*Per* Romer, J., in *Graham* v. *Drummond*, [1896] 1 Ch. at p. 974.)

One executor may act on behalf of all.

The powers of personal representatives over the personal estate of the deceased may, in general, be exercised by one of several executors or administrators.

"Co-executors, however numerous, are regarded in law as an individual person; and, by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all." (Williams on Executors, 10th ed. p. 715.)

"Nothing is clearer than this, and I never knew it

questioned in case of executors, that each executor has the entire control of the personal estate of testator, may release, or pay a debt, or transfer any part of testator's property, without concurrence of the other executor. It has indeed been questioned in case of administrators, whether one administrator had such a power equal to that of executor. . . . [But in *Willand* v. *Fenn*] it was held in B. R. after three arguments, that one administrator stood on the same ground and foundation with one executor." (*Per* Sir J. Strange, M.R., in *Jacomb* v. *Harwood*, 2 Ves. sen. at p. 267.)

"It is a settled principle with respect to the power of executors, that any one of several executors may settle an account with a person accountable to the estate, and that such settlement is binding on the other executors." (*Per* Romilly, M.R., in *Smith* v. *Everett*, 27 Beav. at p. 454.)

Exceptions.

Transfers of stock or shares.

Exceptions.—There are, however, various exceptions to the general principle. Thus, one of two executors cannot make a valid transfer of shares or stock registered in the names of both in a company subject to the provisions of the Companies Clauses Act, 1845. (*Barton* v. *North Staffordshire Railway Company*, 38 Ch. D. 458.)

Under section 29 of the Companies (Consolidation) Act, 1908, "A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer." Ingpen (on Executors, p. 244) says: "It would seem that one of two executors who are noted as executors, but not registered as shareholders, may validly effect a transfer."

Consols.

By section 23 of the National Debt Act, 1870, the Bank of England or of Ireland may require all the executors who have proved the will to join in a transfer of Consols.

Powers over Real Estate.—Since 1897, by virtue of section 2, sub-section 2 of the Land Transfer Act, 1897, and

section 12, sub-section (1) of the Conveyancing Act, 1911, the personal representatives have had the like powers over the real estate (other than copyholds and customary freeholds) as they have over the chattels real of the deceased, except that all the proving executors must concur in selling or transferring it. These sections after 31st December, 1925, are replaced with some modifications by section 2 of the Administration of Estates Act, 1925, and section 39 of the same Act expressly gives the following powers:—

Powers of personal representatives over real estate.

Administration of Estate Act, 1925, s. 39.

"(1) In dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have—

"(i) The same powers and discretions, including power to raise money by mortgage or charge (whether or not by deposit of documents), as a personal representative had before the commencement of this Act, with respect to personal estate vested in him, and such power of raising money by mortgage may in the case of land be exercised by way of legal mortgage; and

"(ii) All the powers discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and powers as if the same affected the proceeds of sale); and

"(iii) All the powers conferred by statute on trustees for sale, and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect, or be varied or rescinded by him and in the case of a contract entered into by a predecessor, as if it had been entered into by himself.

"(2) Nothing in this section shall affect the right of any person to require an assent or conveyance to be made.

"(3) This section applies whether the testator or intestate died before or after the commencement of this Act."

Thus we have the following:—

Executors may sell or mortgage realty.

RULE. The personal representatives have power to sell or mortgage any part of the deceased's real estate.

Where a testator appoints special executors as to property abroad, and other persons as general executors, the latter can make a good title to the English real estate without the concurrence of the special executors. (*Re Cohen's Executors and L. C. C.*, [1902] 1 Ch. 187.)

Power of maintenance.

Trustees' powers of maintenance.—Section 43 of the Conveyancing Act, 1881, gave certain powers to apply the income of an infant's property for maintenance. The section, which is set out in the first edition of this book, did not, however, apply (a) if the interest of the infant was less than a life interest; (b) if the interest did not vest on or before the infant attaining the age of twenty-one years; or (c) where the gift did not carry the interest prior to vesting. The section is, in the case of instruments coming into operation after 31st December, 1925, replaced by section 31 of the Trustee Act, 1925, which is as follows:—

Trustee Act, 1925, s. 31.

"(1) Where any property is held by trustees in trust for any person for any interest whatsoever whether vested or contingent, then, subject to any prior interests or charges affecting that property—

"(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

"(a) any other fund applicable to the same purpose; or

" (b) any person bound by law to provide for his maintenance or education; and

" (ii) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

" Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

"(2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments and shall hold those accumulations as follows:—

" (i) If any such person—

" (a) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

" (b) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which such income arose in fee simple absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust

Trustee Act, 1925, s. 31.

for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

"(ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

"(3) This section applies in the case of a contingent interest only if the limitation or trust carries intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient and subject to any rules of court to the contrary) be five pounds per centum per annum.

"(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

"(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

Trustees' powers of advancement.—The Conveyancing Act, 1881, did not empower trustees to make advances, but such a power is commonly inserted in well-drawn wills. In future, however, it will not usually be necessary to insert this power because it is given by section 32 of the Trustee Act, 1925, in the following terms:— Powers of advancement.

" (1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the concurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs: Trustee Act, 1925, s. 32

" Provided that—

" (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

" (b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

" (c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

"(2) This section applies only where the trust property

consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.

"(3) This section does not apply to trusts constituted or created before the commencement of this Act."

Executor's power of appropriation.—Section 41 of the Administration of Estates Act, 1925, now gives to the personal representative power to appropriate any property in satisfaction of any legacy or share in the following terms:—

Power to personal representative to appropriate.

" (1) The personal representative may appropriate any part of the real or personal estate, including things in action, of the deceased in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased, or of any other interest or share in his property, whether settled or not, as to the personal representative may seem just and reasonable, according to the respective rights of the persons interested in the property of the deceased:

" Provided that—

" (i) An appropriation shall not be made under this section so as to affect prejudicially any specific devise or bequest;

Consents required.

" (ii) An appropriation of property, whether or not being an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust, shall not (save as hereinafter mentioned) be made under this section except with the following consents:—

" (a) when made for the benefit of a person absolutely and beneficially entitled in possession, the consent of that person;

" (b) when made in respect of any settled

legacy share or interest, the consent of either the trustee thereof, if any (not being also the personal representative), or the person who may for the time being be entitled to the income: Administration of Estates Act, 1925, s. 41.

If the person whose consent is required under the foregoing provisions is an infant or a lunatic or defective, the consent shall be given on his behalf by his parents or parent, testamentary or other guardian, committee or receiver, or if, in the case of an infant, there is no such parent or guardian, by the court on the application of his next friend;

" (iii) no consent (save of such trustee as aforesaid) shall be required on behalf of a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time;

" (iv) if no committee or receiver of a lunatic or defective has been appointed, then, if the appropriation is of an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust, no consent shall be required on behalf of the lunatic or defective;

" (v) if, independently of the personal representative, there is no trustee of a settled legacy share or interest, and no person of full age and capacity entitled to the income thereof, no consent shall be required to an apropriation in respect of such legacy share or interest, provided that the appropriation is of an investment authorised as aforesaid.

"(2) Any property duly appropriated under the powers conferred by this section shall thereafter be treated as an authorised investment, and may be retained or dealt with accordingly.

" (3) For the purposes of such appropriation, the personal

Administration of Estates Act. 1925, s. 41.

representative may ascertain and fix the value of the respective parts of the real and personal estate and the liabilities of the deceased as he may think fit, and shall for that purpose employ a duly qualified valuer in any case where such employment may be necessary; and may make any conveyance (including an assent) which may be requisite for giving effect to the appropriation.

"(4) An appropriation made pursuant to this section shall bind all persons interested in the property of the deceased whose consent is not hereby made requisite.

" (5) The personal representative shall, in making the appropriation, have regard to the rights of any person who may thereafter come into existence, or who cannot be found or ascertained at the time of appropriation, and of any other person whose consent is not required by this section.

" (6) This section shall not prejudice any other power of appropriation conferred by law or by the will (if any) of the deceased, and shall take effect with any extended powers conferred by the will (if any) of the deceased, and where an appropriation is made under this section, in respect of a settled legacy, share or interest, the property appropriated shall remain subject to all trusts for sale and powers of leasing, disposition, and management or varying investments which would have been applicable thereto or to the legacy, share or interest in respect of which the appropriation is made, if no such appropriation had been made.

" (7) If after any real estate has been appropriated in purported exercise of the powers conferred by this section, the person to whom it was conveyed disposes of it or any interest therein, then, in favour of a purchaser, the appropriation shall be deemed to have been made in accordance with the requirements of this section and after all requisite consents, if any, have been given.

" (8) In this section, a settled legacy, share or interest includes any legacy, share or interest to which a person is not absolutely entitled in possession at the date of the appropriation, also an annuity, and " purchaser " means a purchaser for money or money's worth.

" (9) This section applies whether the deceased died intestate or not, and whether before or after the commencement of this Act, and extends to property over which a testator exercises a general power of appointment, including the statutory power to dispose of entailed interests, and authorises the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise."

CHAPTER X.

Debts—Administration.

FUNERAL AND ADMINISTRATION EXPENSES.

Funeral and administration expenses.

RULE. The expenses of the funeral of the deceased and the costs of administering the estate are a first charge upon the assets. (*Sharp* v. *Lush*, 10 Ch. D. 468; *Loomes* v. *Stotherd*, 1 Si. & St. 458.)

Funeral expenses.

Funeral expenses.—If the estate is insolvent, the rule, apart from special circumstances, is that no more shall be allowed for the funeral than is necessary. (*Stag* v. *Punter*, 3 Atk. 119.)

"The rule, as against a creditor, is, that no more shall be allowed for a funeral than is necessary. In considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party." (*Per* Bayley, J., in *Hancock* v. *Podmore*, 1 B. & Ad. at p. 264.)

Tombstone.

Funeral expenses do not include the cost of mourning for the family, or of a tombstone. (Ingpen on Executors, p. 308; *Goldstein* v. *Salvation Army Assurance Society*, [1917] 2 K. B. 291; *Johnson* v. *Baker*, 2 Car. & P. 207).

Administration expenses.

Administration expenses.—"Testamentary expenses" and "executorship expenses" are the expenses incident to the proper performance of the duty of the executor; they include the expenses incurred in relation to the administration of the estate, "whether incurred in an administration suit, or whether incurred simply by taking the advice of a solicitor and counsel outside the administration suit as to

the distribution of the estate." (*Per* Jessel, M.R., in *Sharp* v. *Lush*, 10 Ch. D. at pp. 470, 471.)

The fees of the Public Trustee are an administration expense. (*Re Bentley*, [1914] 2 Ch. 456.)

As to death duties, see Chap. XI. Where the estate is insolvent no death duties will be payable. Death duties.

DEBTS.

When the estate of the deceased is insufficient to discharge all the debts and liabilities, it becomes necessary to determine the priorities of the different debts *inter se*. It is to be remarked that before 1926 there are three different rules applicable to the administration of estates according to whether the estate was being administered by the Court, or out of Court, or in bankruptcy. These rules are omitted here; they will be found in the first edition of this book. After 31st December, 1925, there is only one rule, namely:— Insolvent estate.

RULE. In administering the insolvent estate of a person who dies after 31st December, 1925, the same rules apply as if it were administered in bankruptcy. Administration of Estates Act, 1925, First Schedule, Part I.

"1. The funeral, testamentary, and administration expenses have priority.

"2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt." (Administration of Estates Act, 1925, First Schedule, Part I.)

Debts provable in bankruptcy.—Section 30 of the Bankruptcy Act, 1914, states the debts and liabilities provable as follows:— What debts are provable.

"(1) Demands in the nature of unliquidated damages

Bankruptcy Act, 1914, s. 14.

arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy.

"(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

"(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge, by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

Secured creditors.

Secured creditors.—The provisions as to proof by secured creditors contained in the Second Schedule to the Bankruptcy Act, 1914, are as follows:—

"If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

"If a secured creditor surrenders his security to the official receiver or trustee for the general benefit of the creditors, he may prove for the whole debt.

"If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

General rule. All debts rank equally.

Order of debts.—"In bankruptcy . . . the rule as to debts and liabilities provable is that all those debts and liabilities, whether contracted for value or not, shall rank *pari passu*." (*Per* Rigby, L.J., in *Re Whitaker*, [1901] 1 Ch. at p. 12.)

Exceptions: Preferential debts;

Exceptions.—Certain debts and claims have a preference in bankruptcy. These are certain rates, taxes and wages; compensation (not exceeding £100), under the Workmen's

Compensation Acts, 1906 to 1923; and claims for contributions by employers under section 33 of the Bankruptcy Act, 1914, as amended by section 26 of the Unemployment Insurance Act, 1920. (See *Re Heywood*, [1897] 2 Ch. 593; *Re Laycock*, [1919] 1 Ch. 241.)

Apprenticeship fee;

There is also a preferential claim in respect of an apprenticeship fee. (Section 34 of the Bankruptcy Act, 1914.)

Money lent by widow;

Under section 3 of the Married Women's Property Act, 1882, the claim of the widow for money lent to the deceased for the purposes of his trade or business is postponed to those of other creditors (*Re Leng*, [1895] 1 Ch. 652); but where in such case the widow is executrix her right of retainer is not taken away. (*Re Ambler*, [1905] 1 Ch. 697.)

Crown debt;

Whether the Crown still has a priority is doubtful. (*Re Oriental Bank Corporation*, 28 Ch. D. 643.)

Money lent by husband or wife.

Claims for money lent by a husband to a wife or *vice versâ* for the purposes of a trade or business are postponed to the claims of creditors for valuable consideration (Bankruptcy Act, 1914, s. 36); but where a wife afterwards accepts a bond to secure an annuity in lieu of the money lent she can claim in competition with the husband's other creditors. (*Re Slade*, [1921] 1 Ch. 160.)

Arrears of and future payments under a bastardy order cannot be claimed against a deceased's estate (*Re Harrington*, [1908] 2 Ch. 687), but arrears of alimony and maintenance can if the estate is solvent. (*Re Stillwell*, [1916] 1 Ch. 365; *Firman* v. *Royal*, [1925] 1 K. B. 681.)

Before 1926.

Out of legal assets executor might prefer,

but creditor administrator cannot prefer himself.

Preference and retainer.—As amongst creditors of equal degree the executor or administrator could pay one creditor in preference to another out of legal assets, and could in like manner retain a debt due to himself out of legal assets in preference to other creditors of equal degree. The modern form of administration bond granted to a creditor precludes an administrator from preferring himself ([1899] W. N. 262; *Re Duchess of Sutherland*, [1914] 2 Ch. at p. 725), but apparently he can still prefer any other creditor to another of equal degree. (*Re Belham*, [1901] 2 Ch. 52.)

After 31st December, 1925, the distinction between legal and equitable assets (see the first edition of this book and *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231) is abolished, but section 34, sub-section (2) of the Administration of Estates Act, 1925, extends these rights to all assets in the following terms:—

Administration of Estates Act, 1925, s. 34.

"The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person.

"Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors."

Retainer.

Retainer.—"What is retainer? It is this, that an executor having a claim against the testator's estate is not to be put in a worse position than any other creditor, who, by suing and obtaining a judgment against the executor, could obtain priority, while the executor, not being able to sue himself, could not obtain priority. The right of retainer applies to that which the executor has in his hands, or which has been paid into Court while he was executor, and which but for that payment would have come into his hands." (*Per* Cotton, L.J., in *Re Compton*, 30 Ch. D. at p. 19; see also Lindley, M.R.'s judgment in *Re Rhoades*, [1899] 2 Q. B. 347.)

The right does not extend to personal representatives of the executor, not being representatives of the original testator, nor to a claim for damages that are in their nature arbitrary as damages founded upon torts. (*Ib.*)

Statute-barred debt.

An executor may exercise his right of retainer in respect of a statute-barred debt. (*Trevor* v. *Hutchins*, [1896] 1 Ch. 844.)

No retainer out of specific bequest.

An executor has no right of retainer out of specifically bequeathed property. (*Re Savage*, [1918] 2 Ch. 146.)

Before an executor pays a debt of his testator for which he is surety, there is no debt in existence in respect of which

he can exercise his right of retainer. (*Re Beavan*, [1913] 2 Ch. 595.) Executor surety for testator.

An executor who has advanced money to his testator's estate can exercise his right against subsequent assets which come into his hands. (*Re Jones*, [1914] 1 Ch. 742.)

ORDER OF APPLICATION OF ASSETS IN PAYMENT OF DEBTS.

Where the deceased's estate is sufficient to discharge the debts and liabilities, the order in which the assets are to be applied in payment of the debts, though a matter of indifference to the creditors, is of importance to the beneficiaries. The testator can direct in what order the assets should be so applied, but in default of any direction, the assets are not applied *pari passu*, but in an order determined by the established rules of administration. Application of assets in payment of debt when estate is solvent.

These rules have been slightly altered by section 34 (3) of the Administration of Estates Act, 1925 (the previous rules will be found in the first edition of this book), which provides that subject to the rules as to charges on the property of the deceased (see below on Locke King's Acts) the order of application of assets where the estate is solvent is as follows:—

"1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies. Order of application of assets.

"2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid. Administration of Estates Act, 1925, First Schedule, Part I.

"3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.

"4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.

"5. The fund, if any, retained to meet pecuniary legacies.

"6. Property specifically devised or bequeathed, rateably according to value.

"7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value." (Administration of Estates Act, 1925, First Schedule, Part II.)

The order of application may be varied by the will of the deceased, and the rules do not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets. (*Ib.*)

Property brought in by election contributes. (*Re Williams*, [1915] 1 Ch. 450.)

What will exonerate personal estate?

Exoneration of personal estate.—A charge of debts on the real estate was not by itself sufficient to exonerate the personal estate from its primary liability. (*Tait* v. *Lord Northwick*, 4 Ves. 816, 824; *Re Banks*, [1905] 1 Ch. 547.)

The rules of construction in relation to the exoneration of the personal estate named after the cases of *Bootle* v. *Blundell* (1 Mer. 193); *Roberts* v. *Walker* (1 R. & My. 752; *Kidney* v. *Coussmaker* (1 Ves. jun. 426); and *Greville* v. *Browne* (7 H. L. C. 689), are set out in Chapter XX. of Hawkins on Wills. In *Re Smith* ([1913] 2 Ch. 216), there was realty and personalty in a foreign country.

LOCKE KING'S ACTS.

Specific legacy subject to a charge.

Property subject to a charge.—Where personal property which was specifically bequeathed was subject to a charge at the testator's death (for example, if he bequeathed his gold watch which is in pawn), the specific legatee was entitled to have the charge discharged (*Knight* v. *Davis*, 3 Myl. & K. 358) if, subject to the rules as to the order of application of assets, the testator's assets allowed of it.

Real property subject to a mortgage.

This also was formerly the rule as regards real and leasehold property which was subject to a mortgage or charge; but by the Acts known as Locke King's Acts this rule was

altered as to real and leasehold property, and now by section 35 of the Administration of Estates Act, 1925, it is altered as to personal property, and after 31st December, 1925, we have the following:—

Charges on specific devises or bequests.

RULE. If any of the property of the deceased (including property appointed under a general power) is at his death charged with the payment of any sum of money, then in the absence of a contrary intention the property charged is primarily liable to the payment of the money charged on it; neither a general direction to pay debts, nor a charge of debts upon the residuary real estate, is a sufficient indication of a contrary intention.

Administration of Estates Act, 1925, s. 35.

"(1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase-money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

"(2) Such contrary or other intention shall not be deemed to be signified—

"(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or

"(b) by a charge of the debts upon any such estate; unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

"(3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise."

(Administration of Estates Act, 1925, s. 35.)

The relevant sections of the Real Estate Charges Acts, 1854, 1867 and 1877, known as Locke King's Acts, are set out in the first edition of this book, with some notes on them. They applied to a joint mortgage by the deceased and another. (*Re Williams*, [1915] 1 Ch. 450.) As to the meaning of "other document," see *Re Nicholson*, 68 Sol. J. 84.

CHAPTER XI.

Death Duties—Liabilities.

THE subject of death duties is outside of the scope of this book, but it may be convenient to state the general principles which regulate their incidence. In all cases of difficulty the recognised text-books on the subject should be consulted.

ESTATE DUTY.

Estate duty on property of which the deceased could not dispose.

RULE. Estate duty payable in respect of property passing on the death of the deceased which he was *not* competent to dispose of at his death, is borne by the beneficiaries in proportion to their beneficial interests. (*Re Countess of Orford*, [1896] 1 Ch. 257; *Re Hicklin*, [1917] 2 Ch. 278.)

Estate duty for which executor is not accountable borne by beneficiaries in proportion to their interests.

"The decision of North, J., in *In re Countess of Orford* seems to me to be a distinct authority on the construction of the Finance Act, 1894, that in all cases where the duty becomes payable, for which the executor is not made accountable by section 6, sub-section 2, the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares, and it follows that the duty cannot be thrown wholly on the residue." (*Per* Vaughan Williams, L.J., in *Berry* v. *Gaukroger*, [1903] 2 Ch. at p. 131.)

Finance Act, 1894, s. 6 (2).

The words in the sub-section referred to by the Lord Justice are: "The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death."

Section 9 of the Finance Act, 1912, as to estate duty on timber, does not affect the ultimate incidence of the duty. (*Re Smyth*, [1918] 1 Ch. 118.)

Although real estate now vests in the executor as such (*supra*, Chap. IX., p. 80), it did not at the time of the passing of the Finance Act, 1894. The following rule as to incidence is not altered by the Land Transfer Act, 1897. (See section 2, sub-section (3).)

Estate duty a charge upon real estate.

RULE. Estate duty in respect of the real estate of the deceased and upon property appointed by the deceased's will is a first charge upon such real estate and property. (Finance Act, 1894, s. 9.)

Finance Act, 1894, s. 9.

"A rateable part of the estate duty on an estate in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which the duty is leviable." (Finance Act, 1894, s. 9, sub-s. 1.)

Finance Act, 1894, s. 14.

Under section 14, sub-section (1) of the Finance Act, 1894, "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person who, being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary."

Personal property appointed by will in exercise of a general power of appointment does not pass to the executor as such. (*O'Grady* v. *Wilmot*, [1916] 2 A. C. 231.)

Estate duty upon personal property is a testamentary expense.

RULE. Estate duty upon personal property which the deceased was competent to dispose of at his death (otherwise than by appointment) is payable out of the deceased's personal estate as a testamentary expense. (Finance Act, 1894, s. 6; *Re Pullen*, [1910] 1 Ch. 564.)

This principle includes the case of a reversionary interest forming part of the deceased's estate which passes under his will. (*Re Avery*, [1913] 1 Ch. 208.)

Donatio mortis causâ.

A *donatio mortis causâ* does not pass to the executor as such, and estate duty in respect of it is not a testamentary expense. (*Re Hudson*, [1911] 1 Ch. 206.)

SUCCESSION AND LEGACY DUTIES.

Succession and legacy duties borne by beneficiaries.

RULE. Subject to any direction to the contrary, succession duty and legacy duty are borne by the beneficiaries, in respect of their interests, at the appropriate rate. (Succession Duty Act, 1853, s. 42; Legacy Duty Act, 1796, s. 6.)

Both these duties are not payable at the same time. The rate of duty depends on the relationship of the testator or predecessor to the legatee or successor. The tax in each case is on the beneficial interest, but there is a special provision for valuing annuities, &c.

Legacy free of duty.

If a legacy is given free of duty, this is really a gift of an additional legacy equal in amount to the duty, but further duty is not payable upon it. (Legacy Duty Act, 1796, s. 21.) See *post*, p. 117.

Settlement estate duty.

Note.—Settlement estate duty was abolished by section 14 of the Finance Act, 1914, and increment value duty and other land values duties were abolished by section 57 of the Finance Act, 1920.

LIABILITIES.

Some kinds of property are subject to liabilities which are incident to the property, but are not debts owing by the deceased.

Legatee takes property subject to liabilities

RULE. A devisee or legatee takes the property devised or bequeathed subject to liabilities incident to the property, and not resulting in a debt due from

incident to it.

the testator in his lifetime. (*Bothamley* v. *Sherson*, L. R. 20 Eq. 304.)

[In *Stewart* v. *Denton*, 4 Doug. 219] "All the judges held that where there is a charge on the legacy which the testator would or might have been liable to pay, that is to say, a charge created by the testator as distinguished from a charge incident to the chattel, such as rent payable under a leasehold estate, or (as has since been decided) calls upon railway shares, such a charge is payable out of the testator's estate. In fact the distinction seems to turn on this, is the charge one created by the testator for what has been called a temporary purpose, that is, with the view of raising money or of making use of the property (as in the case of the wines, for the purpose of the testator making use of the wines and getting them to this country), or is it from its nature a charge incident to the property, as in the case of rent on leaseholds or calls payable on railway shares? In the first place, the specific legatee is entitled to have the legacy redeemed or freed from the charge. In the second case, he is not so entitled, because the testator is supposed to give the thing as it is, and the charge upon it is really not in strictness an incumbrance, but something incident to the nature of the thing." (*Per* Jessel, M.R., in *Bothamley* v. *Sherson*, L. R. 20 Eq. at p. 315.)

Calls on shares.

Shares.—If a call on shares not fully paid up is actually made before the testator's death, the instalment payable under such call is payable out of the testator's general personal estate. (*Armstrong* v. *Burnet*, 20 Beav. 424; *Addams* v. *Ferick*, 26 Beav. 384.)

Liabilities under leases.

Leaseholds.—Arrears of head rents due at the testator's death are payable out of the testator's general personal estate, future rent by the legatee of the leaseholds. (*Barry* v. *Harding*, 1 Jo. & Lat. 475.) Where the leaseholds are dilapidated at the testator's death the liability to damages for the dilapidations falls on the legatee.

"The question is whether the liability of the testator's estate to pay the future rent, and its liability to damages for the dilapidations, are debts within the meaning of that clause as between the residuary and the specific legatees. I am of opinion that they are not. . These are not debts, but liabilities. Under the covenant to keep the house in repair the testator's estate is liable to pay damages, the measure of which would be the damage done to the reversion by allowing it to be out of repair. This liability is not a debt. . . . A specific legatee takes a property *cum onere*. No one would imagine that if a leasehold held for ninety-nine years was specifically bequeathed, the testator's estate is to pay the rent for the remainder of the term, so that the legatee would get it rent free." (*Per* Jessel, M.R., in *Hawkins* v. *Hawkins*, 13 Ch. D. at p. 473.)

But as between a tenant for life and remainderman of leaseholds the tenant for life is not liable to repair. (*Re Parry and Hopkin*, [1900] 1 Ch. 160.)

Fines on admission to copyholds.

Copyholds.—A devisee of copyholds or customary freeholds is liable to pay the fines, fees, &c. on admission, and these will include such fines, fees, &c. as would have been payable had the land been surrendered to the uses of the testator's will. (Wills Act, 1837, s. 4.)

Incidents of tenure.

Land.—A devisee of land takes subject to all quit rents, incidents of tenure, and other liabilities incident to the estate.

As to the liability of a terre-tenant to be sued for non-payment of a rent-charge issuing out of the land, see the cases referred to in *Re Herbage Rents*, [1896] 2 Ch. 811.

Obligation of landlord.

Land subject to lease.—If land specifically devised is subject to an obligation incident to the relation of landlord and tenant, the specific devisee bears the burden (*Mansel* v. *Norton*, 22 Ch. D. 769), but a covenant to expend money when called upon by the lessee is not incident to the relation,

and the testator's estate bears the burden. (*Eccles* v. *Mills*, [1898] A. C. 360; *Re Hughes*, [1913] 2 Ch. 491.)

Foreign duties.

Foreign duties.—In general a foreign duty on foreign property bequeathed is payable by the legatee. (*Re Scott*, [1915] 1 Ch. 592.)

CHAPTER XII.

Legacies.

Specific legacies do not become the actual property of the legatees until the executor has assented, but the assent relates back to the death, consequently we have:—

Specific bequest carries income from death.

Rule. A specific bequest which is vested carries the income arising from the subject of the bequest as from the testator's death. (*Barrington* v. *Tristram*, 6 Ves. 345.)

Apportionment of income.

Dividends, rents, &c. are apportionable under the Apportionment Act, 1870, unless the testator excludes the operation of the Act. (*Re Lysaght*, [1898] 1 Ch. 115.) As to dividends on cumulative preference shares see *Re Wakley*, [1920] 2 Ch. 205.

Upkeep of specific legacy.

Conversely a specific legatee has to bear the cost of the upkeep of the subject of the bequest as from the testator's death until the assent.

"Now it seems to be settled law that when an executor gives his assent to a specific legacy the assent relates back to the death of the testator, and the specific legatee is entitled to the profits accrued due from the time of the testator's death. That being so, it seems to me to be right and fair that the specific legatee should be charged with the costs of the upkeep, care, and preservation of the specific legacy from the time of the death until the executor's assent." (*Per* Eve, J., in *Re Pearce*, [1909] 1 Ch. at p. 821, where *Sharp* v. *Lush*, 10 Ch. D. 468, which is *contra*, was not cited.)

Death duties payable under foreign law are borne by the specific legatee (*Re Scott*, [1915] 1 Ch. 592; *Re De Som-*

Cost of transfer of shares.

mery, [1912] 2 Ch. 622), so are the cost of transfer of shares or mortgages to a specific legatee (*Re Grosvenor*, [1916] 2 Ch. 375.)

Cost of packing and sending specific legacies.

It is not completely settled how the cost of the packing and delivery of specific legacies is to be borne. In *Re Sivewright*, 67 Sol. J. 168, and *Re Leach*, [1923] 1 Ch. 161, it was held that these costs must be borne by the specific legatees, but in both cases the estate was insufficient to provide for the pecuniary legacies in full. In *Re Hewett*, 65 Sol. J. 116, it was held that executors were entitled to pay and should pay the cost of packing and sending to England chattels in Hong Kong specifically bequeathed to legatees in England under a will proved in England. In *Re Scott*, [1915] 1 Ch. at p. 610, Phillimore, J., said "One knows that in practice . . . a legatee who may be left a picture or some token does not expect to have to bear the cost of packing and sending it. In that sort of way it may be very well held that the testator intends when he gives a bequest of this kind that it should reach the hands of the specific legatee, if it is only a reasonable matter of packing and transfer without expense, but beyond that I decline to go. I know of no authority that the executors are bound to bring a chattel to the testator's domicil, or to bring it from foreign parts in order to deliver it to the legatee."

INTEREST ON LEGACIES.

The general rule is that interest on pecuniary legacies runs from the time when they are payable; the executor has a year to administer the estate, consequently we have:—

Interest on general legacies.

RULE. A general legacy out of personal estate, if no time for its payment is fixed by the will, is payable at the expiration of one year from the testator's death, and carries interest from that date. (Jarman on Wills, p. 1107; *Benson* v. *Maude*, 6 Mad. 15; *Pearson* v. *Pearson*, 1 Sch. & Lef. 10.)

In the absence of a direction to the contrary the rate of interest is 4 per cent. per annum. (R. S. C. O. LV. r. 64; see *Re Davy*, [1908] 1 Ch. 61.) But in special cases the Court may allow 5 per cent. (*Re Bailey*, 61 Sol. J. 398; *Re Brinton*, 67 Sol. J. 704.)

"Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due on such securities is actually got in: but by a rule, that has been adopted for the sake of general convenience, this Court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will. Actual payment may in many instances be actually impracticable within that time: yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment." (*Per* Grant, M.R., in *Wood* v. *Penoyre*, 13 Ves. at p. 333.)

The fact that a general legacy can only be paid out of a reversionary interest does not prevent interest from running before the falling in of the reversion. (*Walford* v. *Walford*, [1912] A. C. 658.)

Future legacy.

"The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval." (*Per* Lord Cairns, C., in *Lord* v. *Lord*, L. R. 2 Ch. at p. 789; *Re Palfreman*, [1914] 1 Ch. 877).

The year seems to be based on the analogy of section 8 of the Statute of Distributions, "but the executor is not bound to wait twelve months before he hands over or pays a legacy." (*Per* Pickford, L.J., in *Re Palmer*, [1916] 2 Ch. at p. 401.)

If an annuity is given, the first payment (in the

Settled legacy.

absence of a contrary direction) is at the end of a year from the testator's death, "but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest." (*Per* Lord Eldon, C., in *Gibson* v. *Bott*, 7 Ves. at p. 96.)

EXCEPTIONS.

Contingent legacies.

Contingent legacies.—In general a contingent legacy does not carry interest while it is contingent (*Wyndham* v. *Wyndham*, 3 B. C. C. 58), unless the legacy has to be severed from the rest of the testator's estate for the benefit of the legatee. (See *Re Inman*, [1893] 3 Ch. 518.)

Power of maintenance.

A power to executors to maintain an infant out of a legacy given to him if he attains twenty-one is sufficient to make the legacy carry interest for the purpose of maintenance, but not where provision is made for the maintenance of the legatee out of some other fund. (*Re West*, [1913] 2 Ch. 345.)

Legacy to infant.

Legacy to infant.—A legacy given to an infant to whom the testator is *in loco parentis* carries interest by way of maintenance from the testator's death, if there is no other provision for the infant's maintenance.

"It is very clear that when a father gives a legacy to a child, whether it be a vested legacy, or not, it will carry interest from the death of the testator, as a maintenance for the child; but this will be only where no other fund is provided for such maintenance." (*Per* Lord Kenyon, M.R., in *Wynch* v. *Wynch*, 1 Cox, at p. 434.)

The rule does not apply to a gift by a mother unless she is actually *in loco parentis* (*Re Eyre*, [1917] 1 Ch. 351), but it may apply to a trust legacy the income of which is given for the maintenance of the testator's widow and children. (*Re Ramsay*, [1917] 2 Ch. 64.)

As to maintenance under section 31 of the Trustee Act, 1925, see *ante*, Chap. IX., p. 86.

The legacy carries interest at 5 per cent. if the income

available is sufficient and subject to any rules of Court to the contrary. See *ante*, p. 88.

Legacy to creditor.

Legacy to creditor.—A legacy to a creditor in satisfaction of his debt carries interest from the testator's death (*Clark* v. *Sewell*, 3 Atk. 96), since, in general, future or contingent legacies will not satisfy a present debt; but this would not apply to a legacy given in satisfaction of somebody else's debt. (*Askew* v. *Thompson*, 4 K. & J. 620.)

Legacy charged on land.

Legacy charged on land.—Where the legacy is charged on land only interest runs from the testator's death (*Pearson* v. *Pearson*, 1 Sch. & Lef. 10); but not if the legacy is charged on land in aid of the personalty, or is payable out of the proceeds of sale of land directed to be sold at the testator's death. (*Turner* v. *Buck*, L. R. 18 Eq. 301.) If, however, the land is directed to be sold on the death of a tenant for life (with a power to postpone the sale), and legacies are given out of the proceeds of sale, it seems that interest runs from the death of the tenant for life. (*Re Waters*, 42 Ch. D. 517.)

Contingent specific gifts.—Contingent specific bequests and contingent specific or residuary devises did not carry the intermediate income (*Bective* v. *Hodgson*, 10 H. L. C. 656), but this rule is altered by section 175 of the Law of Property Act, 1925, so that we have the following:—

Contingent and future specific devises and bequests carry the intermediate income.

RULE. In the case of wills coming into operation after 31st December, 1925, contingent specific bequests and contingent specific or residuary devises carry such part of the intermediate income as is not expressly disposed of.

"A contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose

interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of." (Section 175, sub-section (1) of the Law of Property Act, 1925.)

ADEMPTION OF SPECIFIC BEQUEST.

Ademption of specific bequest.

RULE. A specific bequest fails if the subject-matter of the gift has ceased to form part of the testator's estate before his death. (*Ashburner* v. *McGuire*, 2 B. C. C. 108.)

Stock.

Thus, a specific bequest of stock fails, or in technical language, is adeemed, either wholly or *pro tanto*, if the stock or part of it has been sold in the testator's lifetime. (*Humphreys* v. *Humphreys*, 2 Cox, 184.)

Intention not material.

The intention of the testator is not material. "When the case of *Ashburner* v. *McGuire* was before me, I took all the pains I could to sift the several cases upon the subject, and I could find no certain rule to be drawn from them, except this, to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and if specific, whether the thing remained at the testator's death; and one must consider it in the same manner as if a testator had given a particular horse to A. B. if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate. (*Per* Lord Thurlow in *Stanley* v. *Potter*, 2 Cox, at p. 182; see *Re Slater*, [1907] 1 Ch. at p. 671.)

Nominal change does not cause ademption, *e.g.*, conversion of shares into stock.

A mere nominal change in the subject-matter of a bequest does not give rise to ademption; but it is difficult to know what is a mere nominal change. In *Oakes* v. *Oakes* (9 Hare, 666, overruled on the point whether stock can pass as shares by *Morrice* v. *Aylmer*, L. R. 7 H. L. 717), it was held that the conversion of fully paid shares into stock was not a sufficient change to cause ademption; and it

seems that where shares are merely sub-divided there is no ademption (*Re Clifford*, [1912] 1 Ch. 29), or even when on a reconstruction shares in the new company are substituted for shares in the old. (*Re Leeming*, [1912] 1 Ch. 828—a strong case; see *Re Kuypers*, [1925] 1 Ch. 244.)

Cases of ademption.

On the other hand, it has been held that there is ademption where stock in a water company was by Act of Parliament converted into Water Board Stock (*Re Slater*, [1907] 1 Ch. 665), or where debentures were exchanged for a smaller nominal amount of permanent debenture stock. (*Re Lane*, 14 Ch. D. 856.)

General legacy of stock.

Here it may be remarked that a simple legacy of stock or shares (as, "I give £1,000 Consols") is a general legacy (see Hawkins on Wills, Chap. XXI.), and in such a case, if the nature of the stock or shares is changed in the testator's lifetime, different principles apply. (See *Re Gillins*, [1909] 1 Ch. 345.)

Sale in lunacy.

Where in the testator's lifetime a specific legacy is sold under an order in lunacy the specific legatee is entitled to so much of the proceeds of sale as has not been applied for the lunatic's maintenance. (Lunacy Act, 1890, s. 123, sub-s. 1; *Re Sivewright*, 67 Sol. J. 168.)

Ademption by removal.

Ademption by removal.—A specific bequest may be generic, as of a class of objects, *e.g.*, "my household furniture." In such a case the will speaks from the death. (Wills Act, 1837, s. 24; *Bothamley* v. *Sherson*, L. R. 20 Eq. at p. 312.)

Description of chattels by reference to position.

Such bequests are often made by reference to the position of chattels at the time of the testator's death, as a bequest of "all the pictures in my house at the date of my death." If, then, some of the objects have been removed for a temporary purpose, it may be a question whether or not they pass under the bequest. Thus, jewels placed at a banker's for safe custody have been held to pass. (*Re Johnston*, 26 Ch. D. 538.) The subject of "ademption by removal," as it is sometimes called, is fully discussed in Jarman on Wills, pp. 1098 *et seq.*

ABATEMENT OF LEGACIES.

Testators sometimes give legacies without leaving sufficient assets to provide for them.

General legacies abate *pari passu*.

RULE. If the fund for payment of general legacies is insufficient, then in the absence of a contrary direction the general legacies abate *pari passu*. (*Barton* v. *Cooke*, 5 Ves. 461, 464; *Re Turnbull*, [1905] 1 Ch. 726; *Re Wedmore*, [1907] 2 Ch. 277, 283.)

If a legacy is given free of duty, the amount of the duty is a further pecuniary legacy. (*Re Turnbull, supra.*)

Annuities.

Annuities are legacies; for the purpose of abatement their capital value has to be ascertained. In the case of immediate annuities if the annuitant is dead when it is ascertained that the assets are insufficient for payment in full, the value is taken to be what the annuitant ought actually to have received (*Todd* v. *Beilby*, 27 Beav. 353); but if the annuitant is alive the value is the arrears plus the calculated present value of the annuity. (*Re Wilkins*, 27 Ch. D. 703.)

Where an annuity is reversionary its present value must be taken. (*Potts* v. *Smith*, L. R. 8 Eq. 683; *Re Metcalf*, [1903] 2 Ch. 424.)

Legacy in lieu of dower.

Exception—Legacy in lieu of dower.—A legacy to the testator's widow in satisfaction of her dower has priority (*Re Greenwood*, [1892] 2 Ch. 295; and see section 12 of the Dower Act, 1833); but this doctrine is not extended to other cases where a legacy is given in satisfaction or substitution for some other interest of the legatee so as to raise a case of election. (*Re Wedmore*, [1907] 2 Ch. 277; *Re Whitehead*, [1913] 2 Ch. 56.)

Legacy to widow,

to executor.

It may be mentioned that, apart from any express direction in the will, neither a legacy to the testator's widow is to be paid immediately after the testator's death (*Re Schweder's Estate*, [1891] 3 Ch. 44), nor a legacy to an executor for his trouble (*Duncan* v. *Watts*, 16 Beav. 204), has any priority.

Demonstrative legacies.—A demonstrative legacy—that is, a general legacy which is primarily to be paid out of a particular fund (see *per* Page-Wood, V.-C., in *Paget* v. *Huish*, 1 H. & M. at p. 668) does not fail if the particular fund is non-existent at the testator's death, but ranks with the other general legacies. (*Robinson* v. *Geldard*, 3 Mac. & G. 735, at p. 745.) Demonstrative legacies.

The explanation of the case of *Selwood* v. *Mildmay* (3 Ves. 306) seems to be that Lord Alvanley treated the legacy as demonstrative, though it certainly appeared to be specific.

"A demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable." (*Per* Kindersley, V.-C., in *Mullins* v. *Smith*, 1 Dr. & Sm. at p. 210.) This seems to mean that if part only of the demonstrative legacy can be discharged out of the fund the residue of it will abate *pari passu* with the other general legacies. Abatement of demonstrative legacy.

Specific legacies.—"When the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies." (Williams on Executors, 10th ed. p. 1100.) Abatement of specific legacies.

A gift of the legacy duty payable on a specific legacy is a pecuniary legacy and in the case of a deficiency of assets abates with the other pecuniary legacies. (*Farrer* v. *St. Catharine's College, Cambridge*, L. R. 19 Eq. 19.)

CHAPTER XIII.

Tenant for Life and Remainderman.

ALLHUSEN v. *WHITTELL.*

Rule in *Allhusen* v. *Whittell.*

RULE. The income arising within a year after the testator's death from so much of his estate as is required for the payment of debts and legacies is not to be deemed as income arising from his residuary estate in the absence of a contrary intention expressed in the will. (*Allhusen* v. *Whittell*, L. R. 4 Eq. 295.)

Statement of the principle.

"What I apprehend to be the true principle is, that, in the book-keeping which the Court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted. . . . It is clear that the tenant for life ought not to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever." (*Per* Wickens, V.-C., L. R. 4 Eq. at p. 303.)

Real estate.

The rule applies to real estate. (*Marshall* v. *Crowther*, 2 Ch. D. 199.)

How rule is applied when estate is charged with an annuity.

There has been some difference of judicial opinion as to the correct method of applying the rule where the testator's estate is charged with an annuity. In *Re Perkins* ([1907] 2 Ch. at p. 599), Swinfen Eady, J., said, quoting *Re Bacon*

(62 L. J. Ch. 445): "The proper course is to deal with each payment as it accrues . . . that is to say, ascertain what sum set aside at the death of the testatrix and accumulated at 4 per cent. would have met the particular payment, and attribute that part of the payment to capital . . . and attribute the remaining part to income," but directed the calculation to be made at 3 per cent. In *Re Poyser* ([1910] 2 Ch. 444), Parker, J., followed *Re Perkins*, except that he directed the calculation to be at 3½ per cent. He said: "I also agree with Swinfen Eady, J. that when it is determined that there shall be some apportionment as between tenant for life and remainderman the method of carrying out that is in the discretion of the Court" (p. 448).

Lambert v. *Lambert*.

In *Lambert* v. *Lambert* (L. R. 16 Eq. 320), it was held that the circumstance that the debts and legacies were paid within a year did not affect the application of the rule, with the result that part of the capital of the debts, as well as the interest of the debts, was paid out of income; but in *Re McEuen* ([1913] 2 Ch. 704), Sargant, J., held that the rule was not to be applied in this way, and that the period for which interest is to be reckoned and debited against the tenant for life is not the whole year from the testator's death, but only the part of the year which has elapsed before actual payment of the debts.

Tenants for life are not entitled to the income of any part of the estate which is used for the payment of debts paid after the expiration of the first year. (*Re Wills*, [1915] 1 Ch. 769.)

The rule is discussed in the *Law Quarterly Review*, October, 1914, p. 481, and April, 1916, p. 208.

HOWE v. *LORD DARTMOUTH.*

Where a testator bequeaths his residuary personal estate to persons in succession, an artificial rule of administration "often calculated to defeat what the testator would have wished in order to give effect to his intentions" (4 Jur. (N.S.) 1269), was invented by Lord Eldon.

Rule in *Howe* v. *Lord Dartmouth.*

RULE. Where a testator bequeaths his residuary personal estate to persons in succession then, unless a contrary intention is shown by will, all such parts as are not investments authorised by law for the investment of trust funds should be converted and invested in such investments. (*Howe* v. *Lord Dartmouth*, 7 Ves. 137.)

Statement of the rule.

"I take the result of the rule laid down by Lord Eldon in *Howe* v. *Lord Dartmouth* [7 Ves. 138], and by Lord Cottenham in *Pickering* v. *Pickering* [4 Myl. & Cr. 289], to be, that, where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, the interpretation the Court puts upon the bequest is, that the persons indicated are to enjoy the same thing in succession; and, in order to effectuate that intention, the Court, as a general rule, converts into permanent investments so much of the personalty as is of a wasting or perishable nature at the death of the testator, and also reversionary interests. The rule did not originally ascribe to testators the intention to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention." (*Per* Wigram, V.-C., in *Hinves* v. *Hinves*, 3 Hare, at p. 611.)

Leaseholds.

The rule applies to leaseholds (*Morgan* v. *Morgan*, 14 Beav. 72), except where they are situate abroad. (*Re Moses*, [1908] 2 Ch. 235.) The rule is also applied to reversionary interests for the benefit of the tenant for life. (*Wilkinson* v. *Duncan*, 23 Beav. 469.)

Reversionary interests.

The rule does not apply to an absolute gift subject to an executory limitation over. (*Re Bland*, [1899] 2 Ch. 336.)

Rule does not apply to real estate.

It would be natural to suppose that the rule would also apply to real estate where it consists of property of a wasting nature, such as mines or brickfields, or where the

income will largely increase in the future, as where it consists of freehold ground rents, with a near reversion to the rack-rents, but this is not the case.

Contrary intention.

Contrary intention.—"If the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply." (*Per* Wigram, V.-C., in *Hinves* v. *Hinves*, 3 Hare, at p. 611.)

It is a matter of construction to determine whether the testator has indicated that the rule shall not apply. The cases turn on fine distinctions, and are not altogether satisfactory.

How rule may be excluded.

A mere enumeration of some particulars in a residuary bequest is not, by itself, sufficient to make the bequest specific or to exclude the operation of the rule. (*Re Tootal's Estate*, 2 Ch. D. 628.)

A power of sale may be sufficient to exclude the rule. (*Re Pitcairn*, [1896] 2 Ch. 199.)

A trust for conversion at a future period implies that the property is not to be converted at an earlier date, and thus excludes the rule. (*Alcock* v. *Sloper*, 2 My. & K. 699.)

A power to retain investments excludes the rule while the investments are retained. (*Re Bates*, [1907] 1 Ch. 22; see *Re Wilson*, [1907] 1 Ch. 394.)

At the present time the tendency of the Courts seems to be to apply the rule strictly (almost as if it were a rule of construction), unless there are extremely clear indications in the will that the rule is not to be applied. (See *Re Wareham*, [1912] 2 Ch. 312, and the cases there referred to.)

Course to be adopted if property is not actually converted.

Where the property subject to the rule is not actually converted within a year of the testator's death, the proper course seems to be to ascertain the income which would be produced if the sale had actually been made at the end of the year and the proceeds invested in Consols, and to pay the income so ascertained to the tenant for life and capitalise the rest. (*Re Wareham*, [1912] 2 Ch. 312.)

MEYER v. *SIMONSEN.*

Where there is an express trust for conversion, a well-drawn will usually contains, in addition, a power to postpone conversion, and a direction as to the destination of the income until conversion.

In the absence of such a power and direction the Court adopts the following:—

Rule in *Meyer* v. *Simonsen.*

RULE. Where personal property subject to a trust for conversion is not capable of immediate conversion the property should be valued and 4 per cent. on such value paid to the tenant for life; the residue of the income should be invested, but the tenant for life is entitled to the income produced by such investments. (*Meyer* v. *Simonsen*, 5 De G. & S. 723; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *Re Evan's Will Trusts*, [1921] 2 Ch. 309.)

Statement of rule.

"In this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it has been the practice of the Court to put a value on the property, and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value. That was the rule laid down by Parker, V.-C. in *Meyer* v. *Simonsen* [5 De G. & Sm. 723], and followed by Lord Cairns in *Brown* v. *Gellatly* [L. R. 2 Ch. 751]." (*Per* Lord Macnaghten in *Wentworth* v. *Wentworth*, [1900] A. C. at p. 171.)

In *Meyer* v. *Simonsen* there was no express trust for conversion, but the trustees had a duty to convert under the rule in *Howe* v. *Lord Dartmouth.*

Where there is a trust for conversion and the purchase money is paid by instalments, each instalment is apportioned between capital and income and the tenant for life is entitled to the proportion attributed to income and to

receive the future income from the proportion representing capital. (*Re Hollebone*, [1919] 2 Ch. 93.)

Rule in *Dimes* v. *Scott*.

Where, however, the property could have been converted within a year, then the tenant for life is only entitled to so much of the income as would have been produced from the investment of the proceeds of sale in Consols. (*Dimes* v. *Scott*, 4 Russ. 195.)

Modification of rule where power is given to postpone conversion.

Power to postpone conversion.—Where a residue of personalty is given upon trust for sale, with a power to postpone conversion, but there is no direction as to the income until conversion, a similar rule applies, except that the tenant for life is not entitled to the income of the accumulations arising from so much of the income as exceeds 4 per cent.

"The question depends upon the conventional rule which has been adopted by the Court in cases where a testator has disposed of his property to trustees upon trust for sale with a discretionary power to postpone the conversion of all or any part of the estate, and has given his property to a tenant for life with remainder over, but has not provided that until sale the tenant for life shall have the benefit of the actual income produced by the unauthorised securities which, under the discretion to postpone, the trustees may have retained. The Court in such a case has adopted a rule of taking the estimated capital value of the unauthorised securities at the death of the testator and allowing to the tenant for life 4 per cent. interest upon the estimated amount, and directing that in regard to the surplus income arising out of the unauthorised investments there should be accumulation and capitalisation of that income." (*Per* Neville, J., in *Re Owen*, [1912] 1 Ch. at p. 523; quoted by Eve, J., in *Re Beech*, [1920] 1 Ch. at p. 43.)

Where the consent of the tenant for life is required to conversion the tenant for life is entitled to the actual income (*Re Rogers*, [1915] 2 Ch. 437), also where the power to retain is for the benefit of the tenant for life and not for the

convenient realisation of the estate. (*Re Inman*, [1915] 1 Ch. 187; see also *Re Godfree*, [1914] 2 Ch. 110.)

In some cases a different rate of interest has been given. (*Rowlls* v. *Bebb*, [1900] 2 Ch. 107 (reversionary interest), *Re Woods*, [1904] 2 Ch. 4; *Re Chaytor*, [1905] 1 Ch. 233.)

Rule as to real estate.

Real estate.—But where the residue consists of both real and personal property, the tenant for life is entitled to the rents of the unsold real estate. *Re Oliver*, [1908] 2 Ch. 74.)

"I think that the authorities are clear that where there is a trust for sale of real estate, and the proceeds are settled on a tenant for life, then, at any rate so long as the sale is not improperly postponed, the person entitled to the income of the proceeds is entitled to the rents and profits of the estate until sale." (*Per* Kekewich, J., in *Re Searle*, [1900] 2 Ch. at p. 832.)

APPORTIONMENT OF INCOME.

The Apportionment Act, 1870, gives rise to the following:—

Income is apportionable.

RULE. In the absence of a contrary intention expressed in the will, all rents, annuities, dividends, and other periodical payments in the nature of income are considered as accruing from day to day, and apportionable in respect of time. (Apportionment Act, 1870, s. 2.)

Apportionment Act, 1870.

"All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." (Apportionment Act, 1870, s. 2.)

Section 5 of the Act contains wide definitions of "rents" and "dividends."

"Whenever there are periodical payments accruing when

the event calling for apportionment occurs, the Act is at once brought into operation and must be applied, and when, subsequently, the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation." (*Per* Eve, J., in *Re Muirhead*, [1916] 2 Ch. at p. 185.)

The Act apportions not only the rights of the persons to receive the income, but the liability of the persons to pay it. (*Rochester* v. *Le Fanu*, [1906] 2 Ch. 513.)

Act only applies to income not accrued due.

"The Act is only intended to apply to sums which are accruing but have not accrued due at the time when the apportionment is said to be required. The Act does not, in my opinion, apply to any sum duly and properly paid or accrued due before the happening of the incident which is said to necessitate or require the apportionment." (*Per* Romer, L.J., in *Ellis* v. *Rowbotham*, [1900] 1 Q. B. at p. 744.)

The Act applies to a payment by a company out of revenue in respect of a definite period, although not a periodical payment. (*Re Jowitt*, [1922] 2 Ch. 442.)

Specific property.

The income arising from property specifically bequeathed (*Pollock* v. *Pollock*, L. R. 18 Eq. 329), and the rents from land specifically devised (*Hasluck* v. *Pedley*, L. R. 19 Eq. 271), are apportionable; and the apportioned part of the income or rents up to the death will fall into the general personal estate, unless the same are specifically bequeathed as in *Re Ford* ([1911] 1 Ch. 455).

Shares in a "private" company.

A company incorporated under the Companies Acts is a public company within the Apportionment Act, 1870 (*Re Lysaght*, [1898] 1 Ch. 115), although it may be a private company within section 121 of the Companies (Consolidation) Act, 1908. (*Re White*, [1913] 1 Ch. 231.)

Change of investment by trustees.

Where trustees sell or purchase an investment between two dividend days there is no apportionment (*Scholefield* v. *Redfern*, 2 Dr. & Sm. 173), except in exceptional cases (*Bulkeley* v. *Stephens*, [1896] 2 Ch. 241).

Operation of Act excluded.

As to what words will exclude the operation of the Act

see *Re Edwards*, ([1918] 1 Ch. 142. As to arrears on cumulative preference shares see *Re Marjoribanks*, ([1923] 2 Ch. 307).

SPECIFICALLY BEQUEATHED PROPERTY.

It may be convenient to mention the rights of tenant for life and remainderman in relation to certain particular kinds of property.

Bonus.

Shares in trading companies.—Companies sometimes declare a "bonus" in addition to a dividend, and the question then arises whether such a bonus is income or capital; on this subject the leading case is *Bouch* v. *Sproule* (12 A. C. 385). The following rules are taken from Jarman on Wills, pp. 1223 *et seq.*, and are based upon that case and the other cases quoted below.

Rules deduced from *Bouch* v. *Sproule*.

(a) The decision of the company as to what is capital and what is income is binding on the tenant for life and remainderman. (*Inland Revenue Commissioners* v. *Blott*, [1921] 2 A. C. 171; *Re Thomas*, [1916] 2 Ch. 331.)

(b) If a company has power to increase its capital, it cannot be considered as having converted its profits into capital when it has not taken the proper steps to increase its capital, and consequently any bonus or dividend distributed is not capital.

(c) But, conversely, if a company applies part of its earnings in increasing its capital, and issues new shares to represent the money so applied, the new shares are capital. (*Re Evans*, [1913] 1 Ch. 23; *Re Ogilvie*, 120 L. T. 426.)

(d) If a company has no power to increase its capital, it may be that a bonus out of accumulated profits is capital if the company has, in fact, used them for capital purposes.

(e) Where a company is wound up, and there is a surplus after payment of debts and repaying to the shareholders the capital paid upon their shares, such surplus is capital (*Birch* v. *Cropper*, 14 A. C. 525; *Re Armitage*, [1893] 3 Ch. 337); but whether a reserve fund of undivided profits is to be treated as income seems to depend upon the regulations of

the company. (*Re Crichton's Oil Company*, [1902] 2 Ch. 86, and the cases there referred to; *Re W. J. Hall & Co., Lim.*, [1909] 1 Ch. 521.)

(f) If a company declares a dividend, and at the same time gives the shareholders an option to take up new shares with the amount of the dividend, the value of the dividend is income, and the value of the option is capital. (*Re Northage*, 64 L. T. 625; *Re Malam*, [1894] 3 Ch. 578.)

Payments out of profits.

If a company purport to pay profits to shareholders in reduction of the paid-up capital, but in doing so does not comply with the provisions of the Companies Acts, the money so paid to the shareholders is income. (*Re Piercy*, [1907] 1 Ch. 289.)

"The true rule to be inferred from the cases as between tenant for life and remainderman seems to me to be that the tenant for life is entitled to all payments out of profits made by the company, unless they have been validly capitalised by the company by resolution or otherwise." (*Per* Neville, J., [1907] 1 Ch. at p. 294.)

Call.

If a company makes a call and declares a bonus of the same amount this capitalises the bonus. (*Re Hatton*, [1917] 1 Ch. 357.)

Rent and covenants of leases.

Leaseholds.—A tenant for life of leaseholds has to perform the continuing obligations of the lease during the continuance of his interest. "I am of opinion that a tenant for life, whether legal or equitable, is within the maxim, 'Qui sentit commodum sentire debet et onus': that he is bound to take the *onus* with the *commodum*, and that as head-rent and taxes are ordinary burdens which a tenant in occupation of leaseholds must bear, the testator's widow is liable to pay them out of her own money during her occupancy" (*per* Chatterton, V.-C., in *Kingham* v. *Kingham*, [1897] 1 Ir. 170; quoted by North, J., in *Re Betty*, [1899] 1 Ch. at p. 828); but a tenant for life is not liable to do the repairs which had become necessary at the testator's death. (*Re Courtier*, 34 Ch. D. 136.) Where the property is vested in trustees they are entitled to apply the rents in repairs (*Re Fowler*, 16 Ch. D. 723); but this does

not affect the relative rights of tenant for life and remainderman. (*Re Courtier*, *supra*.)

Rent due at the testator's death, and the then existing liability under the covenants to repair, are liabilities of the testator's estate to be borne in the same way as his other debts, unless a specific legatee is liable to bear them (see *ante*, p. 107).

Renewable leaseholds.

Renewable leaseholds and copyholds.—Where renewable leaseholds are bequeathed in succession, the fines for renewal are borne by the tenant for life and remainderman in proportion to their actual enjoyment. (*Nightingale* v. *Lawson*, 1 Br. C. C. 440; *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711.)

Copyholds.

So fines and fees on the admission of new trustees to copyholds are borne by tenant for life and remainderman in proportion to their interests.

Casual profits.

Casual profits.—"What is the position of the tenant for life of a settled estate? He takes all casual profits which accrue during the time of his tenancy for life. Thus the tenant for life of a manor takes the fines arising from copyholds, because they become payable under an obligation arising from the custom." (*Per* Jessel, M.R., in *Brigstocke* v. *Brigstocke*, 8 Ch. D. at p. 362.)

So, a tenant for life takes fines paid for the renewal of leases (*Re Medows*, [1898] 1 Ch. 300), or money paid for accepting the surrender of a lease not granted under the Settled Land Acts (*Re Hunloke's S. E.*, [1902] 1 Ch. 941); but not if the lease was granted under those Acts. (*Re Rodes*, [1909] 1 Ch. 815.)

Damages.

As to damages recovered for breaches of a covenant to repair, see *Re Lacon's Settlement*, [1911] 2 Ch. 17; and *Re Pyke*, [1912] 1 Ch. 770.

CHAPTER XIV.

Secret Trusts.

Although, in general, parol evidence is not admissible to show the testator's intention, yet if a person induces a testator to leave property to him on the representation that he will hold it in trust for certain other persons, it would be a fraud if the legatee could keep the gift so obtained for his own benefit. Consequently, in such a case a Court of Equity will enforce the trust, and we have the following:—

Secret trusts.

Rule. If A. induces B. either to make or to abstain from revoking a will leaving him property, by expressly promising or tacitly consenting to carry out B.'s wishes concerning it, the Court will hold this to be a trust and compel A. to execute it. (*McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Re Stead*, [1900] 1 Ch. at p. 240.)

Statement of principle.

"There is another well-known class of cases where no trust appears on the face of the will, but the testator has been induced to make the will, or, having made it, has been induced not to revoke it by a promise on the part of the devisee or legatee to deal with the property, or some part of it, in a specified manner. In these cases the Court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would not have made or would have revoked the gift. The principle of these decisions is precisely the same

as in the case of an heir who has induced a testator not to make a will devising the estate away from him by a promise that if the estate were allowed to descend he would make a certain provision out of it for a named person: *Stickland* v. *Aldridge* [9 Ves. 516]; *Wallgrave* v. *Tebbs* [2 K. & J. 313]; *McCormick* v. *Grogan* [L. R. 4 H. L. 82]." (*Per* Kay, J., in *Re Boyes*, 26 Ch. D. at p. 535.)

Tenants in common.

"If A. induces B. either to make, or to leave unrevoked, a will leaving property to A. and C. as tenants in common, by expressly promising, or tacitly consenting, that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after A.'s death, A. is bound, but C. is not bound: *Tee* v. *Ferris* [2 K. & J. 357]; the reason stated being, that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A. and C. as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A. and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A. and C.: *Russell* v. *Jackson* [10 Hare, 204]; *Jones* v. *Badley* [L. R. 3 Ch. 362], the reason stated being that no person can claim an interest under a fraud committed by another; in the latter case A. and not C. is bound: *Burney* v. *Macdonald* [15 Sim. 6]; and *Moss* v. *Cooper* [1 J. & H. 352], the reason stated being that the gift is not tainted with any fraud in procuring the execution of the will." (*Per* Farwell, J., in *Re Stead*, [1900] 1 Ch. at p. 241.)

In *Re Gardner*, [1920] 2 Ch. 523, the testatrix bequeathed her property to her husband during his life, "knowing that he will carry out my wishes," and died intestate as to the *corpus*, which the husband took *jure mariti*. The testatrix had said after the execution of the will that her property after the husband's death was to be divided between certain beneficiaries, and he assented to this. It was held that as to the *corpus* the husband was

a trustee for these beneficiaries, one of whom predeceased the testatrix. (See [1923] 2 Ch. 230.)

Charitable trust.

The secret trust may be for charitable purposes. (*Re Wedgwood*, [1915] 1 Ch. 113.)

Discretion no trust.

If, however, the legatee is given an absolute discretion, although the testator has communicated to him his ideas as to the distribution of the property, there is no binding trust. (*McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Re Pitt-Rivers*, [1902] 1 Ch. 403.)

Trustee, but no trusts declared.

On the other hand, if it is expressed on the face of the will that a legatee is a trustee, but no trusts are declared by the will, then no trust subsequently declared by a paper not executed as a will is binding. In such a case the legatee would be trustee for the next of kin. (See *per* Kay, J., in *Re Boyes*, 36 Ch. D. at p. 535.)

Evidence admissible to prove trust.

Notwithstanding that the will states that there is no trust, evidence is admissible to prove that there is in fact a trust (*Re Spencer's Will*, 57 L. T. 519); the evidence may show that the bargain was that there was to be no trust. (*Re Falkiner*, [1924] 1 Ch. 88.) But a mere power to dispose of property in accordance with the testator's wishes verbally expressed is void for uncertainty, and parol evidence is not admissible to show what the wishes were. (*Re Hetley*, [1902] 2 Ch. 866.)

Secret trust of part of residue.

Where a secret trust affects part of the residue, this part is, in effect, a specific bequest, and is not liable for the testator's debts until the other part of the residue has been exhausted. (*Re Maddock*, [1902] 2 Ch. 220.)

Parol evidence.

"The parol evidence, in order to establish the trust, must at least prove three things: first, that the testatrix at the time of making her will had determined the particular manner in which the residue was to be disposed of; secondly, that she had communicated her determination to the plaintiffs at or before the making of the will; and thirdly, that the plaintiffs either avowedly, or by some other means, have accepted the trust." (*Per* Eve, J., in *Re Gardom*, [1914] 1 Ch. at p. 669.)

PART II.

INTESTACY.

A PERSON dies wholly intestate if he or she has left no will, or if all the dispositions of the will have failed by lapse or otherwise. Partial intestacy occurs where the will does not effectively dispose of all the testator's real and personal estate. Persons, however, often have interests which cannot be disposed of by will, or have powers of appointment over property the destination of which, in default of appointment, is determined by the instrument creating the power. In cases of intestacy the law determines how the property which could have been disposed of by will (except by the exercise of a power) shall devolve after payment of the debts, funeral and testamentary expenses and death duties. The devolution of real or immoveable property follows the *lex loci*, the devolution of the personal or moveable property follows the law of the domicil. (*Enohin* v. *Wylie*, 10 H. L. C. 1.) In English law before 1926 the rules as to real property were entirely different from those as to personal property, including leaseholds. Subject to the rights of a surviving husband or wife the real property of an intestate descended to the heir-at-law, while the personal property was distributed amongst the statutory next of kin. It was therefore necessary to determine, in the first place, what property is real and what personal; then to ascertain the rights of the widow or surviving husband; and then to ascertain the heir-at-law and statutory next of kin.

Total and partial intestacy.

Immoveable property follows *lex loci*, moveable, the law of the domicil.

Before 1925, realty descended to the heir, personalty was distributed among the next of kin.

But on January 1, 1926, a complete revolution will be made in the law of intestacy. The existing law will cease to operate and be replaced by a new scheme the main features of which are:—

New law of intestacy after 1925.

New law.

(1) There is no distinction between realty and personalty.

(2) Males and females are treated alike.

(3) A person who does not attain twenty-one or marry cannot take.

(4) A surviving wife or husband takes £1,000 and the personal chattels; and, if there is no issue, a life interest in the residue, or, if there is issue, a life interest in half of the residue.

(5) Descendants represent their ancestors *per stirpes*.

(6) Collaterals of the whole blood are preferred to those of the half blood.

(7) If there is no grandparent or descendant of a grandparent the surviving spouse takes the whole, or, if no spouse survives, the Crown takes as *bona vacantia*.

Property which passes on death of—joint tenant; tenant in tail.

On the death of a joint tenant the surviving joint tenants or tenant take the deceased's share by survivorship; again, on the death of a tenant in tail in possession the entailed estate descends to the next heir in tail *per formam doni* under the Statute *De Donis Conditionalibus* subject to dower or curtesy (see Chapters XVI. and XV.). But after 31st December, 1925, it will be possible for a tenant in tail in possession to appoint by will the estate or interest of which he is tenant in tail. (Section 176 of the Law of Property Act, 1925.)

The four following chapters discuss the rights, under the law before 1926, of the husband, the widow, the heir and the next of kin to beneficial interests which could have been disposed of by will (otherwise than by appointment) after the funeral and testamentary expenses and debts have been paid.

New law after 1925.

Chapter XX. states these rights under the new law. Since after 31st December, 1925, it will be possible to entail personalty, the rules of descent to issue will remain important, but the rules for descent to collaterals will finally become almost obsolete, unless persons continue to limit property to the heir as *persona designata*. (See section 51, sub-section (1) of the Administration of Estates Act, 1925, and section 132 of the Law of Property Act, 1925.)

In general, the result of a partial intestacy is (as regards

the property undisposed of) the same as if the testator had died totally intestate possessed only of such property, but this is subject to exceptions (*e.g.*, the Intestates Estates Act, 1890, applied only in cases of total intestacy).

In what follows it is assumed that the intestate died domiciled in England, without having any immoveable property outside England.

CHAPTER XV.

The Rights of the Surviving Husband before 1926.

I. *PERSONAL PROPERTY.*

On the death of a woman intestate her husband was entitled to administration as next and most lawful friend under 31 Edw. III. st. 1, c. 11, and as such became entitled to the personal estate after payment of debts and funeral expenses. To avoid any question as to whether this right was affected by the Statute of Distributions, it was provided by section 25 of the Statute of Frauds (29 Car. II. c. 3, made perpetual by 1 Jac. II. c. 17, s. 5), that neither the Statute of Distributions, nor anything therein contained, "shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act." Consequently we have the following:—

Before 1926 a surviving husband takes wife's personalty.

Rule. The surviving husband of a woman who dies before 1926 is entitled to all the personal estate in respect of which she dies intestate. (*Re Lambert's Estate*, 39 Ch. D. 626.)

A married woman cannot, by will, dispose of personal property, which is not held to her separate use, without the assent of her husband. (*Elliot* v. *North*, [1901] 1 Ch. 424.) As a consequence of the Married Women's Property Act, 1882, the cases in which a married woman has property

not to her separate use are becoming uncommon. This has caused a change in the practice of the Probate Division. "The present practice of the Probate Court is not to grant probate of the will of a married woman to the executors in respect of such personal estate as she had power to dispose of by will, and to grant letters of administration *caeterorum* to the husband, which was the old practice, but to grant to the executors probate in general terms, and not to grant any administration to the husband." (*Per* Cotton, L.J., in *Smart* v. *Tranter*, 43 Ch. D. at p. 591.)

Chattels real of wife.

In the case of chattels real of a wife where there was no separate use the husband had, if they were in possession, power to dispose of them during the coverture, and on the death of the wife the husband became entitled *jure mariti* without taking out letters of administration.

"There is no doubt that as to all chattels real of the wife vested in possession during the coverture the husband surviving need not take out administration to the wife. And the rule is the same as to an equitable term." (*Per* Kay, J., in *Re Bellamy*, 25 Ch. D. at p. 623.)

But although the husband need not in such a case take out administration, he does not get the term free from his wife's debts. (*Surman* v. *Wharton*, [1891] 1 Q. B. 491.)

II. *REAL PROPERTY.*

The husband's rights in his deceased wife's real property if she died before 1926 depended upon the nature of the tenure. The rule in the case where the land is held in common socage was as follows:—

CURTESY.

The husband's curtesy before 1926.

RULE. [Before 1926] "The Law of Curtesy gives to the surviving husband an estate for his life in his wife's hereditaments in possession, held for an estate of inheritance by a legal title of which there was actual seisin, if the nature of the property admitted of actual seisin, otherwise seisin in law, or by an

equitable title, and to which there was any issue born during the marriage which might by possibility inherit." (First Report of Real Property Commissioners, p. 19; see *Paine's Case*, 8 Rep. 34a.)

In the matter of curtesy equity followed the law (see *Cooper* v. *Macdonald*, 7 Ch. D. at p. 295), and the Married Women's Property Act, 1882, has not deprived husbands of their right to an estate by the curtesy where the wife dies intestate (*Hope* v. *Hope*, [1892] 2 Ch. 336); but she can dispose of her separate property by deed or will so as to defeat the husband's right. (*Cooper* v. *Macdonald*, 7 Ch. D. 288.)

Estate *pur auter vie.*

There is no estate by the curtesy out of an estate *pur auter vie*. (*Stead* v. *Platt*, 18 Beav. 50.)

S. 33 of Wills Act.

By virtue of the 33rd section of the Wills Act, if a man devises to his daughter in fee, who predeceases him leaving issue, the daughter's husband is entitled to an estate by the curtesy. (*Eager* v. *Furnivall*, 17 Ch. D. 115; *Re Derbyshire*, 75 L. J. Ch. 95.)

Evidence.

As to the evidence that the child was born alive, see *Jones* v. *Ricketts*, 31 L. J. Ch. 753, and the authorities there cited.

Curtesy may be barred by a declaration.

It seems to be possible to bar the husband's curtesy by an express declaration in the will or other document under which the wife took the land. (*Bennet* v. *Davis*, 2 P. Wms. 316.)

"At law, the husband cannot be excluded from the enjoyment of property given to or settled upon the wife; but in equity he may, and this not only partially, as by a direction to pay the rents and profits to the separate use of the wife during coverture, but wholly, by a direction, that upon the death of the wife the inheritance shall descend to the heir of the wife, and that the husband shall not be entitled to be tenant by the curtesy: such a provision was actually made in the case of *Bennet* v. *Davis*, and was actually acted upon by this Court." (*Per* Leach, V.-C., in *Morgan* v. *Morgan*, 5 Madd. at p. 411.)

"The husband does not forfeit his estate by the curtesy, nor the wife her jointure, by adultery." (*Per* Sugden, C., in *Re Anne Walker*, Ll. & G. at p. 326.)

Gavelkind land.—In land of socage tenure subject to the custom of gavelkind the husband's estate by the curtesy, which is sometimes called freebench, is limited to one moiety of his wife's lands, but he takes it whether or not his wife had issue by him born alive. The estate determines on the re-marriage of the husband. (Robinson on Gavelkind.) Gavelkind.

Copyholds.—In copyholds the right to an estate by the curtesy depends upon the custom of the manor. "In some manors the husband takes the whole of the wife's land as tenant by the curtesy, in others only one-half; sometimes on condition of issue born alive, sometimes whether there be issue or not." (Third Report of Real Property Commissioners, p. 14.) Copyholds.

CHAPTER XVI.

The Rights of the Widow before 1926.

Before 1926 widow entitled to £500 if no children.

RULE. If a man dies before 1926 totally intestate leaving a widow but no issue, his widow is entitled to £500 part of the intestate's estate, or the whole thereof if of less value. (Intestates Estates Act, 1890.)

This rule, with the consequential directions that the sum is charged *pari passu* on the real and personal estate, and that such sum is without prejudice to the widow's interest and share in the residue, is enacted by the Intestates Estates Act, 1890, and applies where the intestate died after September 1, 1890.

Intestates Estates Act, 1890.

"The real and personal estates of every man who shall die intestate after the first day of September 1890 leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively." (Intestates Estates Act, 1890, s. 1.)

"Where the net value of the real and personal estates in the preceding section mentioned shall exceed the sum of five hundred pounds the widow of such intestate shall be entitled to five hundred pounds part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such five hundred pounds, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment." (*Ib.* s. 2.)

"As between the real and personal representatives of such intestate, such charge shall be borne and paid in

proportion to the values of the real and personal estates respectively." (*Ib.* s. 3.)

"The provision for the widow intended to be made by this Act shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of five hundred pounds, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed." (*Ib.* s. 4.)

Sections 5 and 6 provide for the method of valuing the real and personal estate for the purposes of the Act.

The widow is not entitled to any part of the real estate in specie. (*Cunningham* v. *Cunningham*, [1920] 1 Ir. 119; *Duncan* v. *Duncan*, [1920] 1 Ir. 212.)

Act does not apply to partial intestacy.

The Act does not apply to cases of partial intestacy (*Re Twigg's Estate*, [1892] 1 Ch. 579), but the Act applies where the executor named in a will predeceases the testator, and all the gifts in the will fail by lapse, so that in the actual events there is a total intestacy. (*Re Cuffe*, [1908] 2 Ch. 500.) The value is to be ascertained as at the testator's death. (*Re Heath*, [1907] 2 Ch. 270.)

PERSONAL ESTATE.

Subject and in addition to the previous rule we have:—

Before 1926, if no issue widow takes one-half, if issue one-third of the estate.

RULE. If a man dies before 1926 intestate leaving a widow but no issue, the widow is entitled to one moiety of his personal estate, but if he leaves issue then the widow is entitled to one-third only of his personal estate. (22 & 23 Car. II. c. 10, ss. 5 and 6.)

The sections of the Act are set out below in Chap. XVIII., pp. 161, 162. Thus, if a man dies intestate without issue, and with no kindred, the widow will first get £500 out of the real and personal estate rateably, and then one moiety of the remainder of the personalty goes to

the widow, and the other moiety to the Crown. (*Cave* v. *Roberts*, 8 Sim. 214.)

This rule also applies where the intestacy is partial.

REAL ESTATE.

Quarentine.

RULE. Before 1926 a widow is entitled to live in the chief mansion house of her husband for 40 days after his death. (9 Hen. III. c. 7; 25 Ed. I. c. 7; Co. Litt. 32b, 34b.)

This right is known as the widow's quarentine, and her dower ought to be assigned to her within the forty days.

Magna Carta.

"A widow, after the death of her husband . . . shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before) or that the house be a castle; and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell, until her dower be to her assigned, as it is aforesaid; and she shall have in the meantime her reasonable estovers of the common; and for her dower shall be assigned unto her the third part of all the lands of her husband, which were his during coverture, except she were endowed of less at the church door." (Magna Carta, 9 Hen. III. c. 7; 25 Ed. 1. c. 7.) The statute 25 Ed. 1. c. 7 is repealed by section 56 of the Administration of Estates Act, 1925.

The law of dower was completely altered by the Dower Act, 1833, which, by section 13, abolished two forms of dower, *ex assensu patris* and *ad ostium ecclesiae*, which were already obsolete. Dower *de la pluis beale* ceased to exist with the abolition of military tenures. (12 Car. II. c. 24.) The nature of these forms of dower is explained in Littelton.

The law was as follows:—

Dower before 1926.

RULE. The widow of a man who dies before 1926 entitled to an estate of inheritance (otherwise than as

a joint tenant or a trustee), whether such estate be legal or equitable, or who has a beneficial interest either wholly equitable or partly legal and partly equitable equal to an estate of inheritance in possession, is entitled to dower out of such land unless the dower has been barred. Dower Act, 1833, s. 2.)

Dower was a right to have a third of the land assigned to her for life. See the passage from Magna Carta quoted above.

In cases of total intestacy, this rule is subject to the first rule, and the dower is subject to abatement in respect of the widow's charge of £500. (*Re Charriere*, [1896] 1 Ch. 912.)

Dower before 1834.

The law before the Dower Act, 1833, is thus stated by the Real Property Commissioners (First Report, p. 16):—

"The present law of dower gives to a surviving wife a right to have assigned to her for her life one-third of all the lands and hereditaments, (with a few exceptions, such as commons *sans nombre* and personal annuities) of which her husband was seised in law, (that is, had the legal property by descent, there being at the same time no possession) or in fact, for an estate of inheritance in possession at any time during the marriage, notwithstanding any alienation or disposition which the husband may have made of the estates, or any part of them. It does not give dower out of lands to which the husband had a right, but of which he had not seisin in law or in fact."

Dower Act, 1833.

By the Dower Act, 1833, equitable estates were made liable to dower, and the necessity for the husband to be seised was got rid of by the following sections:—

"When a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in

joint tenancy), then his widow shall be entitled in equity to dower out of the same land." (Dower Act, 1833, s. 2.)

"When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced." (*Ib.* s. 3.)

As to what is an interest equal to an estate of inheritance in possession, see *Re Michell* ([1892] 2 Ch. 87), and *Lemon* v. *Mark* ([1899] 1 Ir. 416).

The Statutes of Limitation do not apply to an action by a widow for assignment of dower (*Williams* v. *Thomas*, [1909] 1 Ch. 713—the judgment of Cozens-Hardy, M.R., at p. 720, states the position of a dowress), but she may be barred by *laches*.

If the land is sold the widow is not entitled to have her dower valued and paid to her in a lump sum. (*Re Wilson*, [1916] 1 Ch. 220.)

How right to dower may be lost,

If a woman leaves her husband and lives in adultery she loses her dower, unless she is reconciled with and cohabits with her husband. (13 Edw. I. c. 34; *Bostock* v. *Smith*, 34 Beav. 57.) If a wife divorces her husband she loses her right to dower. (*Frampton* v. *Stephens*, 21 Ch. D. 164.)

or barred,

Under section 6 of the Statute of Uses (27 Hen. VIII. c. 10), a woman's right to dower may be barred by a jointure.

"The Legislature long since, by the Statute 27 Hen. VIII. c. 10, provided a method of diminishing the evil to some extent, by making a jointure of a certain description given before marriage, a bar of the right of dower, though such jointure may be of inadequate value, and made to the wife before she has arrived at the age at which she is enabled to assent to such provision. Courts of Equity have enlarged the remedy by making some provisions not strictly within the terms of the statute bars of dower." (First Report of Real Property Commissioners, p. 16.)

Owing to the ease with which dower can be barred under the provisions of the Dower Act, questions do not often arise as to the effect of the statute.

Methods of barring dower since 1883.

The husband can bar his wife's dower in any land by disposing of it in his lifetime, or by his will, or by a declaration contained in any deed or will, or by a devise of any land to the widow out of which she would be entitled to dower.

Dower Act, 1833.

"No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will." (Dower Act, 1833, s. 4.)

"A widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land." (*Ib.* s. 6.)

"A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land." (*Ib.* s. 7.)

"Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will." (*Ib.* s. 9.)

On the other hand, "No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will." (Dower Act, 1833, s. 10.)

Legacy in lieu of dower.

A legacy in lieu of dower is entitled to priority (see section 12 of the Dower Act, 1833); but if the dower has been barred, for instance, by a devise of all the testator's real

estate, such legacy has no priority. (*Re Greenwood*, [1892] 2 Ch. 295.)

Dower partially barred.

The Dower Act also provides that the dower may be partially barred.

"All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower." (Dower Act, 1833, s. 5.)

"The right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid." (*Ib.* s. 8.)

Notwithstanding section 5, a widow's right to dower has priority over the rights of creditors of her deceased husband. (*Spyer* v. *Hyatt*, 20 Beav. 621; *Northern Banking Co.* v. *McMackin*, [1909] 1 Ir. 374; *Jones* v. *Jones*, 4 K. & J. at p. 366.)

Gavelkind.

Gavelkind.—In lands of socage tenure, according to the custom of gavelkind, the widow is dowable of one-half instead of one-third of the land (Third Report of the Real Property Commissioners, p. 9), but the dower only lasts so long as she continues chaste. (See *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525.) The Dower Act applies to gavelkind land. (*Farley* v. *Bonham*, 2 J. & H. 177.) *Re Wilson* ([1916] 1 Ch. 220), was an action for the assignment of dower in gavelkind lands.

Borough English.

Borough English.—"In some boroughs, by custom, the wife shall have for her dower all the tenements which were her husband's." (Litt. section 166.)

On this Coke (Co. Litt. 111a) observes: "In some places the widow shall have the whole, or halfe, *dum sola et casta vixerit*, and the like."

In *Fletcher* v. *Ashburner* (1 Br. C. C. 497), it is stated that the widow "by the custom of burgage tenure, was

entitled to hold the burgage houses in Kendal during her chaste viduity."

Copyholds.

Copyholds.—Where land is held by copy of court roll at the will of the lord, according to the custom of the manor, the widow's right, which is called freebench, depends upon the custom of the manor.

"In some manors the widow has one-third of her husband's land for her dower or freebench, in others one-half of the entirety; sometimes she holds it absolutely for her life, sometimes while she remains sole, and sometimes only while she remains sole and chaste; the forfeiture being sometimes absolute, and sometimes redeemable." (Third Report of Real Property Commissioners, p. 14.)

Apart from any custom to the contrary the right of freebench did not attach until the husband's death. "Under the old law, if a man surrendered his copyhold estate to the use of his will, and then devised it, the widow did not take freebench, the effect of the surrender being to destroy her title to freebench" (*per* Jessel, M.R., L. R. 19 Eq. at p. 350), and consequently since copyholds are now devisable, notwithstanding that the testator may not have surrendered the same to the use of his will (Wills Act, 1837, s. 3), a devise of the copyhold bars the widow's right to freebench thereout. (*Lacey* v. *Hill*, L. R. 19 Eq. 346.) The Dower Act, 1833, does not apply to freebench so as to give the widow a right to freebench out of land to which the husband was not at the time of his death tenant on the court rolls. (*Smith* v. *Adams*, 5 D. M. & G. 712.)

CHAPTER XVII.

The Heir-at-law Before 1926.

When the deceased dies before 1926 intestate as to land held in fee simple, such land descends to the heir-at-law of the deceased subject to the estate in dower or curtesy of the surviving wife or husband, and subject to the rights, if any, of the widow under the Intestates Estates Act, 1890. (*Supra*, Chap. XVI., p. 140.)

The rules of descent were materially altered by the Inheritance Act, 1833. A good account of the alterations will be found in Challis on Real Property, Chap. XVI.

The rules of the descent of an estate in fee simple held in common socage were as follows:—

Descent traced from purchaser.

Rule. Descent is traced from the last purchaser. (The Inheritance Act, 1833, s. 2.)

Purchaser means "the person who last acquired the land otherwise than by descent, or than by any escheat, partition or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent." (Inheritance Act, 1833, s. 1.)

The Inheritance Act, 1833, s. 2.

"In every case descent shall be traced from the purchaser: and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purpose of this Act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the

land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same." (*Ib.* section 2.)

Thus, if A. dies intestate having an estate in fee which was devised to him by will, the descent is traced from A., but if A. has acquired the estate by descent on the death of his uncle X., the descent is traced from X., unless it be proved that X. in his turn had acquired the estate by descent.

After 31st December, 1925, land will not descend to the heir, unless it is entailed. Since personalty will also be capable of being entailed the rules of descent to issue will remain important. On the other hand the rules of descent to a collateral heir will only be required where land is limited to an heir as *persona designata*. The abolition of the rule in *Shelley's Case* may cause this to occur more frequently than it does at present. The following four rules apply to the descent of an estate tail general or entailed interest.

Land descends to issue.

RULE. Land descends to the issue of the last purchaser *in infinitum*.

Thus, so long as the last purchaser has any descendants male or female, one or some of them must be the heir.

Males admitted before females.

RULE. Male issue is admitted before the female.

Thus, as between a son and a daughter of the purchaser the son, though younger, is the heir.

Eldest male inherits, females inherit as coparceners.

RULE. Where two or more of the male issue are in equal degree of consanguinity to the purchaser the eldest alone inherits; but in the case of female issue the females inherit together as coparceners.

Thus, as between two sons the eldest son is the heir, but in the absence of sons two or more daughters inherit together. As to coparcenary see Challis on Real Property, 3rd ed., p. 373.

Descendants represent ancestor.

RULE. The lineal descendants *in infinitum* of any person deceased represent their ancestor, and stand in the same place as their ancestor would have done if living. This right of representation is more powerful than the preceding rules where it conflicts with them.

Thus, if A., the last purchaser, dies leaving a granddaughter, the only child of his eldest son (who predeceased A.), and also another son, the granddaughter, as representing the eldest son, is preferred to the surviving son.

This right of representation applies to land of all tenures.

DESCENT TO COLLATERALS.

The following rules, which trace the descent when there is no issue, will no longer be required in the case of deaths occurring after 31st December, 1925, but since it will still be permissible to limit land to an heir as *persona designata* the rules will still be required to determine how such an heir is ascertained.

The father.

When the last purchaser has no issue, it is necessary to go back to his father, who, if alive, will be the heir. If the father be dead, then if issue of his are alive some or one of his issue will be heir, and the descent is traced as if such father had been the purchaser, subject to a rule giving the whole blood preference over the half-blood. If the father in this case has no issue, it is necessary to go back to the father's father, and so on.

Where no descendant, father, or descendant of father, inherits.

RULE. Every lineal ancestor is capable of being heir to any of his issue; and in every case where there is no issue of the purchaser his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a

brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue. (Inheritance Act, s. 6.)

When all the male paternal ancestors have been exhausted, it is necessary to go to female paternal ancestors in accordance with the next two rules.

Paternal ancestors and their descendants inherit before maternal and their descendants.

RULE. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, are capable of inheriting until all his paternal ancestors and their descendants shall have failed; and no female paternal ancestor of such person, nor any of her descendants, are capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed. (*Ib.* s. 7.)

Thus, the mother of A., the purchaser, cannot inherit so long as any paternal ancestors or any descendant of any paternal ancestor of A. is alive; and the paternal grandmother of A. cannot inherit so long as any male paternal ancestor or any descendant of any male paternal ancestor is alive.

Mother of more remote paternal ancestor or her descendants inherit before mother of less remote paternal ancestor or her descendants.

RULE. Where there is a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, are the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there is a

failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, are the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants. (*Ib.* s. 8.)

Thus, the mother of a paternal grandfather and her descendants are preferred to the mother of the father and her descendants.

The position of the half-blood is determined by the following:—

The half-blood. Inheritance Act, s. 9.

RULE. Any person related to the person from whom the descent is to be traced by the half-blood is capable of being his heir; and the place in which any such relation by the half-blood stands in the order of inheritance, so as to be entitled to inherit, is the next after any relation in the same degree of the whole blood, and his issue, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female. (*Ib.* s. 9.)

Thus, a brother of the half-blood on the part of the father inherits next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother inherits next after the mother. (Section 9.)

Inheritance Act, s. 4.

RULE. Where a person acquires land under a limitation to the heirs or to the heirs of the body of any of his ancestors, the land descends and the descent thereof is traced as if the ancestor named in such limitation had been the purchaser of the land. (*Ib.* s. 4.)

Notice that this applies to limitations to heirs general as

well as to heirs special, whereas the rule in *Mandeville's Case* (Co. Litt. 26b) did not apply to heirs general. (See *Moore* v. *Simkin*, 31 Ch. D. 95.)

On failure of heirs of purchaser, descent is traced from person last entitled.

RULE. Where there is a total failure of heirs of the purchaser, or where any land is descendible as if an ancestor had been the purchaser thereof, and there is a total failure of the heirs of such ancestor, then the descent is traced from the person last entitled to the land as if he had been the purchaser thereof. (Law of Property Amendment Act, 1859, s. 19.)

Thus, if A., a male, the purchaser, dies intestate leaving an only son and no other relations, on the death of the son intestate without issue, the estate does not escheat, but will descend to the son's mother if living, or, if dead, to some other relation on the mother's side.

Posthumous heir.

Qualified heir.

Posthumous heir.—A posthumous heir is only entitled to the rents from his birth, the rents between the death of the intestate and the birth of the posthumous heir go to the qualified heir, *i.e.*, the person who is heir between the death of an intestate and the birth of a posthumous heir. (*Richards* v. *Richards*, Johns. 754; *Re Mowlem*, L. R. 18 Eq. 9.)

Escheat.

RULE. Before 1926 where no heir can be ascertained the land escheats to the lord.

On the subject of escheat, see Robertson on Civil Proceedings by and against the Crown, Book IV. By the Intestates Estates Act, 1884, the law of escheat, which was formerly only applicable to a legal estate in corporeal hereditaments, is extended to any estate or interest, whether legal or equitable, in any incorporeal hereditament, and to any estate or interest in any corporeal hereditament.

The material sections of the Act, which received the Royal Assent on 14th August, 1884, are:—

The Intestates Estates Act, 1884.

"From and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments." (Intestates Estates Act, 1884, s. 4.)

"Where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person therein was legal or equitable, is, owing to the failure of the objects of the devise, or other circumstances happening before or after the death of such person, in whole or in part not effectually disposed of, such person shall be deemed, for the purposes of this Act, to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of." (*Ib.* s. 7.)

In *Re Wood* ([1896] 2 Ch. 596), a testatrix died without an heir, having devised real estate upon trust for sale, and to pay thereout debts, funeral expenses and legacies, but made no disposition of the residue. It was held that the residue of the proceeds of sale escheated to the Crown.

After 31st December, 1925, escheat is abolished, but if there are no persons who take the property on an intestacy it goes to the Crown as *bona vacantia*. (See Chap. XX.)

Descent on death of a coparcener.

Coparceners.—If A., the purchaser, dies intestate leaving two daughters and no other descendants, the daughters inherit as coparceners; if, then, one of the daughters dies intestate leaving a son, it might be supposed, since under section 2 of the Inheritance Act, 1833, descent is to be traced from the purchaser, that one-half of the deceased daughter's share would go to her son and the other half to the surviving daughter; but, chiefly owing to the arguments of the late Mr. Joshua Williams, it has been decided that

such is not the case, and that the son of the deceased daughter takes her share. (*Cooper* v. *France*, 19 L. J. Ch. 313; *Re Matson*, [1897] 2 Ch. 509.) In *Re Matson*, the son of a coparcener died intestate, and it was held that such coparcener's share descended to a grandson of the coparcener, who was a nephew of such son, to the exclusion of the descendants of the coparcener's sister.

GAVELKIND.

In lands held by socage tenure according to the custom of gavelkind (*a*), the above rules of descent are modified by the following:—

Gavelkind land descends to all males.

RULE. Gavelkind land descends to all males in equal degree in equal shares. (Third Report of the Real Property Commissioners, p. 9; 17 Ed. II. c. 16.)

"According to the custom of gavelkind, the partibility among heirs of the same degree extends to all degrees of remoteness." (*Per* Farwell, J., in *Re Chenoweth*, [1902] 2 Ch. at p. 497.)

The *jus representationis* applies to gavelkind lands. (*Hook* v. *Hook*, 1 H. & M. 43.)

BOROUGH ENGLISH.

In land held by socage tenure according to the custom of Borough English the rules of descent are modified as follows:—

Borough English land descends to youngest son.

RULE. Borough English land descends to the youngest son of the purchaser to the exclusion of his other children. (Third Report of the Real Property Commissioners, p. 8.)

"In some places this peculiar rule of descent is confined to the case of children; in others, the custom descends to

(*a*) See note at the end of this chapter.

brothers and other male collaterals." (Third Report of the Real Property Commissioners, p. 8.)

"The nature of that descent" [*i.e.*, descent according to the custom of Borough English] "is, that it substituted for the heir-at-law, in all cases, a different person as heir, but in all other respects it is regulated by the ordinary rules of descent." (*Per* Page-Wood, V.-C., in *Rider* v. *Wood*, 1 K. & J. at p. 656.)

COPYHOLDS.

Copyhold land descends according to the custom of the manor.

Where land is held by copy of court roll at the will of the lord according to the custom of the manor, there is no uniform rule, and descent is traced according to the custom of the manor.

"Each manor has for itself a system of laws, to be sought in oral tradition, or in the court rolls or proceedings of the customary court, kept often by ignorant and negligent stewards. . . . In the greatest number of manors the common law rule of descent prevails; but in some the land goes according to the custom of gavelkind, and in others according to the custom of Borough English; and in a few instances, if there be no son, to the eldest of several daughters." (Third Report of the Real Property Commissioners, p. 14.)

The custom of the manor has to be proved, and in so far as it is not proved to extend the descent follows the common law. Thus, in *Re Smart* (18 Ch. D. at p. 170), Bacon, V.-C., referring to the manor of Singleton in Sussex, said: "The custom of this manor is, that upon the death of a tenant, his youngest son, if there be one, shall take; if not, his youngest daughter, if there be a daughter; if not, his youngest brother or sister, uncle or aunt, if any such there be. But if there be none, there is an end of the custom. It is as if it had never existed, and the inheritance must descend according to the course of the common law." (See also *Muggleton* v. *Barnett*, 2 H. & N. 653.)

In the manor of Taunton Dene the widow is customary heiress. (*Hounsell* v. *Dunning*, [1902] 1 Ch. 512.)

In the manor of Sedgley, on the first descent after a

surrender, the copyholds descend to the eldest son, if no surrender to the youngest son. (*Bickley* v. *Bickley*, L. R. 4 Eq. 216.)

CUSTOMARY FREEHOLDS.

Customary freehold descends according to the custom of the manor.

"A tenure called customary freehold exists in many parts of the kingdom, especially in Cumberland, Westmoreland, a part of Lancashire called Oversands, the south-western parts of the counties of Durham and Northumberland, and the northern borders of Yorkshire. It is a base tenure, partaking to a considerable degree of the nature of copyhold; but the holding is generally declared to be according to the custom of the manor, without being at the will of the lord. . . . The customs in these manors vary considerably. . . . Among females of equal degree the whole estate sometimes descends to the eldest, instead of being divided in coparcenary." (Third Report of the Real Property Commissioners, p. 20.)

Burgage tenure.

As to burgage tenure, see *Busher* v. *Thompson* (16 L. J. (N.S.) C. P. 57).

THE DESCENT OF AN ESTATE TAIL.

Estate tail.

An estate in tail general (until it is barred) descends as an estate in fee simple would descend from the donee in tail, so long as any issue of the donee are in existence. But the line of descent may be restricted as to one sex, or to the issue of two named persons, or in other ways. An estate in tail male descends to males only, and does not descend to any male who traces his descent through a female. (*Bernal* v. *Bernal*, 3 My. & Cr. 559, 581.) An estate in special tail to the heirs of the body of two named persons only descends to the issue of such persons.

It is also possible to grant an estate tail to a man and the heirs of his body by a woman of a specified class or bearing a specified name. (*Page* v. *Hayward*, 2 Salk. 570; *Pelham Clinton* v. *Duke of Newcastle*, [1902] 1 Ch. 34; affd. [1903] A. C. 111.)

Where the land is subject to a special custom the estate descends according to such custom.

After 31st December, 1925, it will be possible to entail personalty as well as realty in equity by such expressions as would create an estate tail in land in a deed (section 130, sub-section (1) of the Law of Property Act, 1925), and it will also be possible for a tenant in tail in possession to devise or bequeath the entailed property. (Section 176 of the same Act.)

Copyholds.

Copyholds (not being within the Statute *De Donis Conditionalibus*) cannot be entailed unless there is a special custom to entail.

"To show that by custom an estate tail might be created, you must show that there have been surrenders in tail with remainders over, (for otherwise that may be a fee simple conditional) or that the lands had been enjoyed for such a length of time, have gone so long in a course of descent according to the limitation, as to exclude the supposition of a fee-simple conditional." (*Per* Lord Hardwicke, C., in *Moore* v. *Moore*, 2 Ves. sen. at p. 601.)

ESTATES PUR AUTER VIE.

Estate *pur auter vie.*

Where a man died before 1926 intestate as to an estate *pur auter vie*, which was limited to him and his heirs, the heir takes as special occupant. "The general doctrine as to estates *pur auter vie* is plain enough. As to lands, if there is a lease to A. during the life of B., and A. dies living B., any person (at common law) who got possession of the land might hold it during the remainder of B.'s life as general occupant. But if the lease is to A. *and his heirs* during the life of B., then general occupancy is not permitted, and upon the death of A. the heir of A. would take. Now an heir, strictly speaking, can take by *descent* only an estate of *inheritance*, and it is, therefore, inaccurate to speak (though the expression is frequently used) of a descendible freehold not of inheritance. The heir in the case put takes not by *descent*; it is true, he takes it because he fills the character of heir; but he takes not as heir by *descent*, but as *special* occupant." (*Per* Kindersley, V.-C., in *Northen* v. *Carnegie*, 4 Drew. at p. 590; *Re Michell*, [1892] 2 Ch. 87.)

Under section 6 of the Wills Act, 1837, "In case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate." Wills Act, s. 6.

"Now, it must be admitted that where an estate *pur autre vie*, whether equitable or legal, is created without any designation of a special occupant, the law casts it in the event of the death of the grantee, upon the executor, and it is for those who say that it ought to go to the heir to show that there are some words in the creation of that equitable or legal estate *pur autre vie* which throw it upon a special occupant. It has long since been established that in determining the quality of an estate *pur autre vie*, that is whether it goes to a special occupant or to the executor by statute, you look to the terms of the last conveyance of the estate, and not to the original grant, to ascertain whether it is to go to the heir or to the legal personal representative." (*Per* Lord Davey in *Mountcashell* v. *More-Smyth*, [1896] A. C. at p. 164; see also *Re Inman*, [1903] 1 Ch. 241.)

Although estates *pur auter vie* are not entailable by virtue of *De Donis*, they can be limited so as to descend in a way resembling an estate tail. (*Mogg* v. *Mogg*, 1 Mer. 654.) Quasi-entail.

NOTE ON GAVELKIND.

Before 1926 all land of socage tenure in the county of Kent was held according to the custom of gavelkind, unless it was held by military tenure prior to 12 Car. II. c. 24, or unless it had been disgavelled by Act of Parliament. This was the common law of Kent, and the custom need not be proved. (*Re Chenoweth*, [1902] 2 Ch. 488.) A list of the Before 1926, land in Kent was *primâ facie* of gavelkind tenure.

names of the persons whose lands have been disgavelled by Act of Parliament is given in Robinson on Gavelkind. As to the evidence to show that land has been disgavelled, see *Doe* d. *Bacon* v. *Brydges* (6 Man. & G. 282).

Lands are also partible according to the custom of many manors, and also by custom in the case of some lands held by socage tenure (for details, see Robinson on Gavelkind, Book I., Chap. III.), but in such cases the custom has to be proved. The partibility of lands in Wales was abolished by 34 & 35 Hen. VIII. c. 26, ss. 91 and 128.

Robinson on Gavelkind also contains some information in relation to the custom of Borough English.

There are learned articles on customary descent in 68 Sol. J. pp. 807, 839, 864 and 880.

Gavelkind tenure is abolished by section 45 (1) (a) of the Administration of Estates Act, 1925.

CHAPTER XVIII.

The Next of Kin before 1926.

PERSONAL estate does not descend, but subject to the rights of the husband and wife, which have already been stated in Chaps. XV. and XVI., was, before 1926, distributed amongst the next of kin in accordance with a series of rules, which are mainly based on the Statutes of Distribution (22 & 23 Car. II. c. 10, and 1 Jac. II. c. 17).

The fifth, sixth and seventh sections of the former statute run as follows:—

The Statute of Distributions, s. 5.

"That all ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: and in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have

any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate." (Section 5.)

Sect. 6.

"In case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them." (Section 6.)

Sect. 7.

"That there be no representations admitted among collaterals after brothers' and sisters' children: and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever." (Section 7.)

The general effect of the statute.

"The general effect of the provisions is, that (supposing there to be no wife) the estate, in case there are descendants, shall go between the children and their representatives; and in case there are no descendants, shall go amongst the next of kin or their representatives; and that the division is *per capita* where all the takers claim in their own right; and *per stirpes* where they, or some of them, claim as representatives of another person. It has long been settled that the word 'representatives' in this Act includes only 'descendants.'" (*Per* Wickens, V.-C., in *Re Ross's Trusts*, L. R. 13 Eq. at p. 292.)

General principle, before 1926.

From these sections and the decisions the rules stated below may be deduced. The phrase "such persons as legally represent such children" means the living children of such children. The general principle is that nearest of

kin according to the degrees of the civil law take equally, subject to certain exceptions:—

Exceptions—

First.—That children of deceased children or of deceased brothers and sisters can take by representation.

Secondly.—That brothers and sisters are preferred to grandparents.

Thirdly.—That where ascendants are husband and wife, the wife is entirely excluded.

Fourthly.—That the mother shares with brothers and sisters. (1 Jac. II. c. 17, s. 7.)

Method of calculating the degrees.

The degrees according to the civil law are calculated by taking the number of generations from one party up to the common ancestor and then down again to the other party. Thus, brothers are in the second degree, being one degree up to the father and one degree down again; an aunt and nieces are in the third degree, being one degree up to the aunt's parent and then two degrees down to the niece. (See *per* Strange, M.R., *post*, p. 168.)

Half-blood.

There is no distinction between the kin of the half- and the whole blood; (*Jessopp* v. *Watson*, 1 My. & K. 665); so long as there is a common ancestor and both are of kin to the intestate. (*Crooke* v. *Watt*, 2 Vern. 120; *Rutland* v. *Rutland*, 2 P. Wms. 216).

Posthumous child.

Persons *en ventre sa mère* are considered as living for the purpose of the rules. Thus, a posthumous brother of the half-blood would share equally with a brother of the whole blood. (*Burnet* v. *Mann*, 1 Ves. sen. 156.)

The following rules must not be read singly, but considered in the light of one another.

Before 1926, subject to the rights of the widow the issue take the personalty *per stirpes*.

RULE. If a person dies intestate before 1926 without leaving a husband but leaving issue, then, subject to the rights of the widow (if any), the personal estate is distributed among the issue *per stirpes*. *Provided* (a) the children of a living person do not take; (b) if

any child shall have received any advance or (not being the heir-at-law) an estate by settlement from his father, the intestate, this shall be brought into hotchpot. (*Re Natt*, 37 Ch. D. 517.)

"If there are descendants but no children living to share the estate, it is to be divided into as many shares as there are children who have left living descendants, and that the descendants of each such child are to take as representing the child, and, of course, only the child's share." (*Per* Wickens, V.-C., in *Re Ross's Trusts*, L. R. 13 Eq. at p. 293.)

The hotchpot provisions.

"According to the Statute of Distributions, every child is bound to bring into hotchpot all advances made to him by an intestate in his lifetime, that there may be an equal distribution of the estate. The heir-at-law is excepted from that; but it is plain, from the latter part of the 5th section of the Act, that he is only excepted as to land derived from the intestate. Therefore, whenever an advance is made to the heir-at-law out of the personal estate he must bring that advance into account; but if he gets land only, he is not bound to bring it into account." (*Per* Malins, V.-C., in *Chantrell* v. *Chantrell*, 37 L. T. N. S. 220; quoted with approval by Porter, M.R., in *Re Lyons*, [1903] 1 Ir. 156.)

"By the course of practice in the Court of Chancery advancements under the statute are taken without interest up to the time of the death; and from the death, inasmuch as the distribution is referred back to the actual date of death, 4 per cent. interest is allowed, that is, the child who has been advanced pays 4 per cent. from the death of the parent but not before." (*Per* Jessel, M.R., in *Stewart* v. *Stewart*, 15 Ch. D. at p. 545.)

If borough English land descends to the youngest son as heir he need not bring it into hotchpot under the statute. (*Lutwyche* v. *Lutwyche*, Cas. t. Talb. 276.)

The hotchpot provisions apply where the intestate makes a will which becomes inoperative by reason of the

death of all the beneficiaries in his lifetime (*Re Ford*, [1902] 2 Ch. 605); but "there is an existing rule that in the case of partial intestacy as to the beneficial interest the doctrine of hotchpot does not apply." (*Per* Neville, J., in *Re Roby*, [1907] 2 Ch. at p. 87; affd. [1908] 1 Ch. 71.) Nor do the hotchpot provisions apply where the intestate is the mother. (*Holt* v. *Frederick*, 2 P. Wms. 356; *Preston* v. *Green*, [1909] 1 Ir. 172.) The issue of a deceased child (who has been advanced) must bring advances made to their parents into hotchpot when they take by representation. (*Proud* v. *Turner*, 2 P. Wms. 560.)

The hotchpot provisions of the statute do not extend to brothers and sisters. Thus, children of a deceased sister taking as representing their mother do not bring an advance made to her into hotchpot. (*Re Gist*, [1906] 1 Ch. 58; affd. [1906] 2 Ch. 280; *Re White*, 111 L. T. 274.)

As to the meaning of "advance," see *Taylor* v. *Taylor*, L. R. 20 Eq. 155; *Re Blockley*, 29 Ch. D. 250; and *Re Scott*, [1903] 1 Ch. 1.

Before 1926, where no issue father takes.

RULE. If a person dies intestate before 1926 leaving a father but no issue or husband, then the father takes the personal estate subject to the rights of the widow (if any). (22 & 23 Car. II. c. 10, s. 6; and see *Ratcliff's Case*, 3 Rep. at p. 40a; *Blackborough* v. *Davis*, 1 P. Wms. at pp. 50, 51.)

Thus, in a case of total intestacy, the widow takes £500 rateably out of the real and personal estate, and one moiety of the remainder of the personalty, and the father takes the other moiety. If no widow, the father takes all the personalty. The father and mother (if living) are the nearest of kin, both being in the first degree. The reason why the mother takes nothing seems to be that she is considered to be one person with her husband; apparently this rule has not been altered by the Married Women's Property Act, 1882.

Before 1926; when the mother takes.

RULE. If a person dies intestate before 1926 leaving a mother but no father, husband, issue, brother, sister or children of a brother or sister, then subject to the rights of the widow (if any) the mother takes the personal estate. (*Jessopp* v. *Watson*, 1 My. & K. at p. 676.)

Here the mother is next of kin, being in the first degree, and 1 Jac. II. c. 17, s. 7, does not apply. (See next rule.)

Before 1926, the mother shares with brothers and sisters and children of deceased brothers and sisters.

RULE. If a person dies intestate before 1926 leaving a mother but no father, husband or issue, then subject to the rights of the widow (if any), the personal estate is distributable equally between the mother, the brothers and sisters living, and the children of deceased brothers and sisters, such issue taking *per stirpes*. (1 Jac. II. c. 17, s. 7; *Jessopp* v. *Watson*, 1 Myl. & K. 665; *Keylway* v. *Keylway*, 2 P. Wms. 344; *Stanley* v. *Stanley*, 1 Atk. 455.)

"If after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." (1 Jac. II. c. 17, s. 7.)

The representation does not extend beyond children of brothers and sisters. (*Pett's Case*, 1 P. Wms. 25; *Pett* v. *Pett*, 1 Salk. 250.)

Before 1926, children of a deceased brother or sister represented their parents if there was another brother or sister of the intestate who survived

RULE. If a person dies intestate before 1926 leaving one or more brothers and sisters and also children of a deceased brother or sister, such children take by representation the share their parent would have taken if alive. (22 & 23 Car. II. c. 10, ss. 6, 7; *Pett's Case*, 1 P. Wms. 25.)

Thus, if the intestate dies leaving no parents, issue, wife or husband, but leaving a sister, a brother and two

children of a deceased sister, the sister and brother each take one-third, and the children of the deceased sister each take one-sixth.

"Where there are no ancestors or descendants, and the nearest of kin are brothers and sisters, but there are also children of dead brothers and sisters, the latter, though not of the next of kin, may claim as representatives of the brother or sister from whom they spring, and may stand in the place of that brother or sister for the purpose of distribution; so that the distribution is *per stirpes*. This privilege is expressly limited by the statute, and does not extend to any more remote descendants of brothers and sisters than their children, and does not apply at all to any case where the next of kin are all more remote than brothers and sisters." (*Per* Wickens, V.-C., in *Re Ross's Trusts*, L. R. 13 Eq. at p. 293; *Stanley* v. *Stanley*, 1 Atk. at p. 456.)

No representation where no brother, sister or mother living.

Where there is no brother, sister or mother living the children of deceased brothers and sisters take *per capita*, because in that event they do not take by representation.

Thus, in *Lloyd* v. *Tench* (2 Ves. sen. 213), Sir J. Strange, M.R., says: "This is not the case of a brother or sister to the intestate, but of the children of the brothers or sisters, where there is no brother to bring up the issue of the other to a representation, but all stand in a proper degree, and take *per capita*, and not *per stirpes*, merely because they do not stand in light of representation. If there is one brother living and another has left children, however many, they take but a moiety with the brother: but if that brother had been dead, all in the same line of equality take *per capita*," and held that the intestate's personal estate was divisible in thirds between the aunt, the nephew and the niece. (2 Ves. sen. p. 215; see also L. R. 13 Eq. at p. 293.)

Before 1926, brothers and sisters take before grandparents.

RULE. If a person dies intestate before 1926 then as between brothers and sisters and grandparents the brothers and sisters take the personalty to the

exclusion of the grandparents. (*Evelyn* v. *Evelyn*, Amb. 191; 3 Atk. 762.)

The origin of this rule is unknown; it is contrary to the express words of the Statute of Distribution, since grandparents, equally with brothers and sisters, are of the second degree.

Before 1926, remote kindred of equal degree take equally.

RULE. Where a person dies intestate before 1926, then subject to the foregoing rules all persons who stand in equal degree to the intestate take equally, except that where ascendants are husband and wife the wife is excluded. (*Durant* v. *Prestwood*, 1 Atk. 454.)

"It has been further settled that where all the persons entitled to claim are collaterals equally near of kin, for instance, second cousins twice removed, they take *per capita*, because they all take in their own right." (*Per* Wickens, V.-C., in *Re Ross's Trusts*, L. R. 13 Eq. at p. 293.)

Method of computation of degrees.

Thus, in *Lloyd* v. *Tench* (2 Ves. sen. 213), where the contest was between an aunt and the nephew and niece of the intestate, Sir J. Strange, M.R., said (p. 214): "Some things are so clear, they need only be mentioned: as first in all questions of the Statute of Distribution the rule to go by in computing the degrees of proximity of blood must be taken from the civil law; and on this ground and foundation stand all the cases which have come in judgment since the Statute of Distribution either at law or in this Court. Next that, computing the degrees in this case by the rule of the civil law, the three contending parties stand in equal degree as next of kin to the intestate, *viz.* each in a third degree; and the computation must be in this manner: as to the aunt the father is one degree, the grandfather a second, and the aunt a third: so as to the nephews and nieces the father is one, the brother two, and nephew and niece in the third degree."

Thus, a grandmother being of the second degree takes before an aunt, who is of the third. (*Ib.*)

An uncle being of the third degree takes before the son of a deceased aunt, who is of the fourth. (*Bowers* v. *Littlewood*, 1 P. Wms. 593.)

Grandparents.

As between grandparents, since a husband and wife are one person in law, if the next of kin were two grandfathers and a grandmother, it would seem that each grandfather would take a moiety; but it might be contended that the grandfather and grandmother, who were married, took one moiety between them. The point does not seem to be decided; probably the Married Women's Property Act, 1882, has not made any difference. (Compare *Re Jupp*, 39 Ch. D. 148.)

A grandfather on the father's side and a grandmother on the mother's side share equally. (*Moore* v. *Barham*, 1 P. Wms. p. 53.)

If no kin Crown takes personalty.

RULE. If a person dies intestate before 1926 leaving no husband or blood relations, then subject to the rights of the widow (if any) the personal property goes to the Crown (*Cave* v. *Roberts*, 8 Sim. 214), unless the intestate died domiciled in Cornwall, when it goes to the Duke of Cornwall. (*Solicitor of the Duchy of Cornwall* v. *Canning*, 5 P. D. 114.)

In such a case administration is granted to the Treasury Solicitor (the Treasury Solicitor Act, 1876), or where the King is entitled in right of his Duchy of Lancaster to the Solicitor of the Duchy of Lancaster. (Duchy of Lancaster Act, 1920.) For details, see Robertson on Civil Proceedings by and against the Crown, p. 495.

Executors take to the exclusion of the Crown.

If, however, the deceased appointed executors, then in the absence of a contrary intention the executors took the undisposed-of residue of the personal estate, since the Executors Act, 1830, did not apply when there were no next of kin. (Section 2.) See Hawkins on Wills, p. 362.

Under the Statute of Distributions the administrator is not to distribute for a year, but this provision is merely for the benefit of creditors and does not prevent the interest of the next of kin vesting on the intestate's death. (*Cooper* v. *Cooper*, L. R. 7 H. L. at p. 65.)

CHAPTER XIX.

Conversion.

FLETCHER v. *ASHBURNER.*

It might be supposed that where property passed under an intestacy, that the relative rights of the heir-at-law and the next of kin would depend upon the actual nature of the property—real or personal—at the date of the death. But this is not so. Courts of Equity did not permit the rights of persons to be varied because the nature of the property had not been changed in accordance with a binding trust to convert it. Equity acted as if what ought to have been done had been done. Consequently we have the following rule:—

Fletcher v. *Ashburner.*

Rule. "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted." (*Per* Sir T. Sewell, M.R., in *Fletcher* v. *Ashburner*, 1 Br. C. C. at p. 499.)

A mere declaration does not cause conversion.

To effect a conversion there must be an imperative trust or direction to convert. "A mere declaration that personalty shall devolve or pass to persons successively as realty is in itself inoperative, for the whole doctrine of conversion turns on the maxim that equity considers to have been done what ought to have been done pursuant to the trust; and a mere declaration such as I have mentioned creates no obligation as to dealing with the property in one way or another." (*Per* Parker, J., in *Re Walker*, [1908]

2 Ch. at p. 712; *Re Aspinall's Settled Estates*, [1916] 1 Ch. 15; *Re Twopenny's Settlement*, [1924] 1 Ch. 522.)

Order for sale in administration action.

An absolute order for sale made within the jurisdiction of the Court in an administration suit, operates as a conversion from the date of the order and before any sale has taken place. (*Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257.)

"If a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow: and that there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found." (*Per* Jessel, M.R., in *Steed* v. *Preece*, L. R. 18 Eq. at p. 197; followed in *Burgess* v. *Booth*, [1908] 2 Ch. 648.)

Notice to treat.

A notice to treat under the Lands Clauses Consolidation Act, 1845, does not operate as a contract, but it does so soon as the purchase-money is agreed (*Watts* v. *Watts*, L. R. 17 Eq. 217); but until the purchase is completed it seems that the rents are treated as unconverted. (*Ib.*)

Constructive reconversion.

Where the purchase-money is paid into Court, and belongs to parties under a disability, it is liable to be re-invested in land so that there is a constructive reconversion. Thus, in *Kelland* v. *Fulford* (6 Ch. D. 491), where land of an infant had been taken by a railway company, Jessel, M.R., after discussing the terms of section 69 of the Lands Clauses Consolidation Act, 1845, says: "Till the person becomes entitled to the money to his or her own use there is a constructive reconversion, which he or she on becoming so entitled can always stop, but until that event happens the money is to be laid out in lands or buildings to stand limited to the same uses as the lands sold stood limited, and therefore must be considered as land. I hold, therefore, that there has been a reconversion of this fund; that it is still real estate, and that consequently it belongs to the infant's heir-at-law" (p. 495; see also *Re Tugwell*, 27 Ch. D. 309.)

Person under disability.

Where property belonging to a person who is under a disability, such as lunacy or infancy, is taken compulsorily,

the general principle is that for the purpose of devolution its nature is not altered.

"There seems to me to be a broad general principle underlying all these questions, which is this, that where property is taken compulsorily from any person who is not *sui juris*, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property, which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever" (*per* James, L.J., in *Re Barker*, 17 Ch. D. at p. 243; quoted by Eady, J., in *Herbert* v. *Herbert*, [1912] 2 Ch. at p. 275; *Hopkinson* v. *Richardson*, [1913] 1 Ch. 284); but an order for sale of property made in a partition action operates as a conversion of the share of a person *sui juris* as from the date of the order, and, therefore, on the death before sale of the person entitled, his share of the unsold real estate will devolve as personalty. (*Re Dodson*, [1908] 2 Ch. 638; *Herbert* v. *Herbert*, [1912] 2 Ch. 268.)

Sale in partition action.

The share of an infant, however, in land sold in a partition action, even if the infant is plaintiff by his next friend, is not converted as against the heir-at-law of the infant, if the latter does not attain twenty-one. (*Re Norton*, [1900] 1 Ch. 101.)

Where land of a lunatic is sold under the Lunacy Act, 1890, section 123, sub-section 1 of the Act provides that: "The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of." (*Re Alston*, [1917] 2 Ch. 226.)

Sale under Lunacy Act, 1890.

Capital money under Settled Land Acts.

It will be remembered that capital money arising under the Settled Land Acts and the investments representing the same are considered as land for all purposes of disposition, transmission and devolution. (Settled Land Act, 1925, s. 75, sub-s. (5).) But it has been held that where land under a settlement would have escheated to the Crown if unsold, the proceeds of sale, where the land has been sold under the powers of the Settled Land Acts, go to the Crown as *bona vacantia*. (*Re Bond*, [1901] 1 Ch. 15.)

Trust for sale on request or with consent.

A trust for sale upon the request or with the consent of a person operates as a conversion. (*Re Goswell's Trusts*, [1915] 2 Ch. 106; *Re Ffennell's Settlement*, [1918] 1 Ch. 91; *Re Sturt*, [1922] 1 Ch. 416.)

Election.—The parties interested in the property to be converted may, however, if they all agree and are *sui juris*, elect to take it in its unconverted state.

Election to take in specie.

"To establish an election to take 'in specie' and free from a trust to convert, I think it is necessary to have sufficient evidence of the election to be derived from declarations or acts and conduct of the parties, and where it is sought to establish such an election by a person or persons only entitled so to elect subject to the rights of third persons to insist upon a sale, it must be shown in like manner that such persons have assented." (*Per* Byrne, J., in *Re Douglas and Powell's Contract*, [1902] 2 Ch. at p. 312.)

Foreign law.

Foreign law.—"The equitable doctrine of conversion only arises and comes into play where the question for consideration arises as between real estate and personal estate. It has no relation to the question whether the property is moveable or immoveable." (*Per* Russell, J., in *Re Berchtold*, [1923] 1 Ch. at p. 206.)

LAWES v. *BENNETT*.

The case of *Lawes* v. *Bennett* has given rise to the following anomalous rule:—

RULE. Where the deceased has given to another an option to purchase land of the deceased and this option is exercised after the death of the deceased, the proceeds of sale devolve as part of the deceased's personal estate. (*Lawes* v. *Bennett*, 1 Cox, 167; *Weeding* v. *Weeding*, 1 J. & H. 424; *Re Isaacs*, [1894] 3 Ch. 506; *Re Marlay*, [1915] 2 Ch. 264.) *Lawes* v. *Bennett.*

The constructive conversion, however, only takes place from the date of the exercise of the option, so that the heir or devisee takes the intermediate rents. (*Townley* v. *Bedwell*, 14 Ves. 591.)

If, however, the option is prior to the will, and the property subject to it is specifically devised, this is sufficient to negative the operation of the rule. Will may exclude rule.

"When you find, that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract, without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it." (*Per* Wood, V.-C., in *Weeding* v. *Weeding*, 1 J. & H. at p. 431; quoted by Stirling, J., in *Re Pyle*, [1895] 1 Ch. at p. 727.)

ACKROYD v. *SMITHSON.*

In addition to the cases where the deceased's property is subject to a trust for conversion, there are cases where the testator himself directs a conversion for a purpose which fails. The leading case on this subject is celebrated for the argument of Lord Eldon (then Mr. Scott). The rule is—

RULE. "Where real estate is directed to be converted into personal, for a purpose expressed, which purpose fails, either wholly, or partially, in the *Ackroyd* v. *Smithson.*

former case, though the estate has been converted, the whole produce of that conversion will still be real estate; and in the latter, as far as the purpose fails, so far the money is to be considered realty, and not personalty." (*Per* Lord Eldon, C., in *Hill* v. *Cock*, 1 V. & B. at p. 174; *Ackroyd* v. *Smithson*, 1 B. C. C. 503.)

If purposes of conversion fail, property retains its original nature.

"Conversion must be considered in all cases to be directed for the purposes of the will, and is limited by the purposes and exigencies of the will. If therefore the real estate be directed to be sold, with a view to a disposition made by a will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate for the purpose of ascertaining the ownership, that is, the title of the heir; although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the will has no effect in altering the quality of the property; but the property, even in the shape of lands, retains its pristine and original quality of personal estate, for the purpose of determining the ownership." (*Per* Lord Westbury, C., in *Bective* v. *Hodgson*, 10 H. L. C. at p. 667.)

Where land is directed to be converted into money for purposes which fail, it is necessary to determine whether the heir takes the property as personalty or as realty.

Where partial failure, heir takes as personalty.

"Where there is a partial undisposed interest of real estate directed to be sold, that interest results to the heir of the testator and it becomes personal estate in his hands; of course, so long as he is alive it is immaterial whether it is real or personal estate; but on his death it seems to me, that on principle as well as by virtue of the authorities which are summarised in Jarman on Wills [4th ed. Vol. I. p. 630], that the proposition I have just stated is correct,

and I do not remember in my experience to have heard it questioned. There is the other proposition, namely, that, if the purposes of the direction for conversion in the will wholly fail—that is, if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made—the property will devolve upon the heir as real estate." (*Per* Chitty, J., in *Re Richerson*, [1892] 1 Ch. at p. 381; see also the statement of the principle by Leach, M.R., in *Smith* v. *Claxton*, 4 Madd. at p. 492.)

Where total as realty.

If a future trust for sale never arises there is no conversion. (*Re Hopkinson*, [1922] 1 Ch. 65.)

Note.—The importance of the doctrine of conversion depended mainly on the fact that realty and personalty did not pass in the same way as an intestacy. The assimilation of the law effected by the Administration of Estates Act, 1925, will diminish the importance of the doctrine and gradually render it almost obsolete. But that will take time. The first edition of this book has a section on whether various kinds of property are real or personal, but in view of the change of the law it is omitted in this edition. An elaborate list will also be found in the first edition of Tyssen on Charitable Bequests, pp. 338 *et seq.*

CHAPTER XX.

The New Law of Intestacy.

The new law of intestacy, Jan. 1, 1926.

AFTER 31st December, 1925, the rules already stated in the preceding chapters for the devolution of property upon intestacy will cease to operate, and an entirely fresh set of rules applicable to all species of property will come into force. These rules are contained in Part IV. of the Administration of Estates Act, 1925, which is set out in the Appendix; they are rather complicated, and only the general effect is summarised in the following rules. The general principles are stated, *ante*, p. 134. It must be borne in mind that the whole estate will be subject to a trust for conversion, with power to postpone the sale (section 33, sub-section(1)), and that where issue or other persons are contingently entitled by reason of their being under age and unmarried the statutory powers of maintenance and advancement will be applicable to the income of their expectant shares (section 47, sub-section (1) (ii)), and that there is a power to purchase or redeem the life interest of a surviving spouse (section 48, sub-section (1)). Where the deceased leaves a will and dies partially intestate, the rules only apply to such part of his estate as is not effectively disposed of by the will (section 49). The personal representative has a year to administer (section 44).

THE ACT SHOULD IN ALL CASES BE REFERRED TO AFTER THE GENERAL PRINCIPLE HAS BEEN ASCERTAINED FROM THE FOLLOWING RULES.

THE RIGHTS OF A SURVIVING HUSBAND OR WIFE.

Administration of Estates Act, s. 46 (1) (i).

RULE. If after 31st December, 1925, a person dies intestate the surviving spouse takes :—

(a) The personal chattels of the intestate.

(b) £1,000 charged on the residuary estate of the intestate carrying interest at 5 per cent. from the death until payment or appropriation. The rights of a surviving spouse.

(c) A life interest in the residuary estate if the intestate leaves no issue who attain twenty-one or marry; but if the intestate leaves such issue then a life interest in one-half of the residuary estate, and if the trusts of the other half for the issue fail or determine during such life interest, then a life interest in that half also.

(d) The whole of the estate if the intestate leaves no grandparent or any issue of a grandparent who attain twenty-one or marry. S. 46 (1) (v).

"Personal chattels" mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money. (Administration of Estates Act, 1925, s. 55, sub-s. (1) (x).) Personal chattels.

THE RIGHTS OF THE ISSUE.

RULE. If after 31st December, 1925, a person dies intestate leaving issue who attain twenty-one or marry, then, subject to the rights of the surviving spouse (if any), the residuary estate is held in trust equally *per stirpes* for the issue living at the death of The issue. Sect. 46 (1) (i) (b), (ii). Sect. 47.

the intestate who attain twenty-one or marry, subject to any child of the intestate who has received an advance bringing the advance into hotchpot.

The statutory trusts.

The trusts for issue are called the statutory trusts, and are set out in section 47 of the Act. (See Appendix, *post*, p. 186.)

Hotchpot.

If the deceased only dies intestate as to part of his property, the issue have also to bring into hotchpot any beneficial interests acquired by them under the will of the deceased. (Section 49.)

THE RIGHTS OF PARENTS.

Parents.
Sect. 46 (1) (iii) (iv).

RULE. If after 31st December, 1925, a person dies intestate leaving no issue who attain twenty-one or marry, then, subject to the rights of the surviving spouse (if any), the residuary estate belongs to the surviving parents or parent (if any), and if both survive, then to them equally.

THE RIGHTS OF GRANDPARENTS AND THEIR DESCENDANTS.

Grandparents and collaterals.
Sect. 46 (1) (v).
Sect. 47 (3).

RULE. If after 31st December, 1925, a person dies intestate leaving no issue who attain twenty-one or marry, and no parent, then subject to the rights of the surviving spouse (if any), the residuary estate is held in trust for the following surviving relatives in the following order:—

Brothers and sisters and their issue.

(1) equally *per stirpes* for such of the surviving brothers and sisters of the whole blood and the surviving issue of dead brothers and sisters of the whole blood as attain twenty-one or marry.

(2) equally *per stirpes* for such of the surviving brothers and sisters of the half-blood and the surviving issue of dead brothers and sisters of the half-blood as attain twenty-one or marry.

(3) equally for the surviving grandparents. Grandparents.

(4) equally *per stirpes* for such of the surviving uncles and aunts of the whole blood and the surviving issue of dead uncles and aunts of the whole blood as attain twenty-one or marry. Uncles and aunts and their issue.

(5) equally *per stirpes* for such of the surviving uncles and aunts of the half-blood and the surviving issue of dead uncles and aunts of the half-blood as attain twenty-one or marry.

(1), (2), (4) and (5) above are the statutory trusts stated in section 47, sub-section (3), by reference to section 47, sub-section (1). See *post*, p. 187.

THE RIGHTS OF THE CROWN.

RULE. If after 31st December, 1925, a person dies intestate leaving no surviving spouse, grandparent or issue of a grandparent who attain twenty-one or marry, the residuary estate belongs to the Crown or the Duchy of Lancaster or the Duke of Cornwall, as the case may be. The Crown. Sect. 46 (1) (vi).

See *ante*, p. 169.

EXCEPTIONS.

Exception.—Lunacy.—The above rules do not apply "to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age [on 1st January 1926] and unable by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased devolve in accordance with the general law in force before [1st January 1926] applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case. Lunacy. Sect. 51 (2).

"For the purposes of this sub-section a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged." (Section 51, sub-section (2) of the Administration of Estates Act, 1925.)

Notice that this exception only applies to real estate; the lunatic's personal estate, including chattels real, will devolve under the new law. The realty will descend to the lunatic's heir-at-law traced according to the rules set out in Chapter XVII., subject to any rights of a surviving wife or husband in respect of dower or an estate by the curtesy.

Lunatic includes defective.

"'Lunatic' includes a lunatic whether so found or not, and in relation to a lunatic not so found; 'committee' includes a person on whom the powers of a committee are conferred under section 1 of the Lunacy Act, 1908, and "defective" includes every person affected by the provisions of section 116 of the Lunacy Act, 1890, as extended by section 64 of the Mental Deficiency Act, 1913, and for whose benefit a receiver has been appointed." (Administration of Estates Act, 1925, s. 55, sub-s. (1) (viii).)

Infant. Sect. 51 (3).

Exception.—Infant.—"Where an infant dies [after 31st December 1925] without having been married, and independently of this subsection he would, at his death, have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly." (Section 51, sub-section (3) of the Administration of Estates Act, 1925.)

Since *ex hypothesi* the infant has no issue, the entailed interest ceases on his death. Thus if he were entitled in fee simple under a settlement, there would be, apparently, a resulting trust to the settlor; if under a will with no residuary devise, there would be an intestacy as to this real estate.

APPENDIX.

PART IV. OF THE ADMINISTRATION OF ESTATES ACT, 1925.

DISTRIBUTION OF RESIDUARY ESTATE.

Abolition of descent to heir, curtesy, dower and escheat.

45.—(1) With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished—

(*a*) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever; and

(*b*) Tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate, whether arising under the general law or by custom or otherwise; and

(*c*) Dower and freebench and every other estate and interest of a wife in real estate as to which her husband dies intestate, whether arising under the general law or by custom or otherwise: Provided that where a right (if any) to freebench or other like right has attached before the commencement of this Act which cannot be barred by a testamentary or other disposition made by the husband, such right shall, unless released, remain in force as an equitable interest; and

(d) Escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall or to a mesne lord for want of heirs.

(2) Nothing in this section affects the descent or devolution of an entailed interest.

Succession to real and personal estate on intestacy.

46.—(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:—

(i) If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—

(a) If the intestate leaves no issue, upon trust for the surviving husband or wife during his or her life;

(b) If the intestate leaves issue, upon trust, as to one half, for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate; and, as to the other half, on the statutory trusts for the issue of the intestate, but if those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then upon trust for the surviving husband or wife during the residue of his or her life:

(ii) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;

(iii) If the intestate leaves no issue but both parents, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely;

(iv) If the intestate leaves no issue but one parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely;

(v) If the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall

be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely:—

First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Secondly, on the statutory trusts for the brothers and sisters of the halfblood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the halfblood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Sixthly, for the surviving husband or wife of the intestate absolutely;

(vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat.

The Crown or the said Duchy or the said Duke may (without prejudice to the powers reserved by section nine of the Civil List Act, 1910, or any other powers), out of the whole or any part of the property devolving on them respectively, provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision. 10 Edw. 7. and 1 Geo. 5 c. 28.

(2) A husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons.

Statutory trusts in favour of issue and other classes of relatives of intestate.

47.—(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:—

(i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;

(ii) The statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest;

(iii) Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives;

(iv) The personal representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as

the personal representatives may consider reasonable, and without being liable to account for any consequential loss.

(2) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest—

(*a*) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving issue living at the death of the intestate;

(*b*) references in this Part of this Act to the intestate "leaving no issue" shall be construed as "leaving no issue who attain an absolutely vested interest";

(*c*) references in this Part of this Act to the intestate "leaving issue" or "leaving a child or other issue" shall be construed as "leaving issue who attain an absolutely vested interest."

(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

Powers of personal representative in respect of interests of surviving spouse.

48.—(1) Where a surviving husband or wife is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal representative) or, where the tenant for life is the sole personal representative, with the leave of the court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest.

(2) The personal representatives may raise—

(*a*) the net sum of one thousand pounds or any part thereof and the interest thereon payable to the surviving husband or wife of the intestate on the security of the whole or any part of the residuary estate of the intestate (other than the personal chattels), so far as that estate may be sufficient for the purpose or the said sum and interest may not have been satisfied by an appropriation under the statutory power available in that behalf; and

(*b*) in like manner the capital sum, if any, required for the purchase or redemption of the life interest of the surviving husband or wife of the intestate, or any part thereof not satisfied by the application for that purpose of any part of the residuary estate of the intestate;

and in either case the amount, if any, properly required for the payment of the costs of the transaction.

Application to cases of partial intestacy.

49. Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications:—

(*a*) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons:

(*b*) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.

Construction of documents.

50.—(1) References to any Statutes of Distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires,

as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act.

(2) Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act. 53 & 54 Vict. c. 29.

51.—(1) Nothing in this Part of this Act affects the right of any person to take beneficially, by purchase, as heir either general or special. Savings.

(2) The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case.

For the purposes of this subsection a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged.

(3) Where an infant dies after the commencement of this Act without having been married, and independently of this subsection he would, at his death, have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly.

(4) This Part of this Act does not affect the devolution of an entailed interest as an equitable interest.

Interpretation of Part IV.

52. In this Part of this Act "real and personal estate" means every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate which (otherwise than in right of a power of appointment or of the testamentary power conferred by statute to dispose of entailed interests) he could, if of full age and capacity, have disposed of by his will.

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